IN THE SUPREME COURT OF THE UNITED STATES

October TERM, 1977

NO. 77-6333

JAMES W. COOPER, JR., Petitioner

-vs-

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF OHIO

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I N D E X

AUTHORITIES CITED

Cases:

Statutes:

Rules:

Ohio Rules of Criminal Procedure

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The Petitioner, JAMES W. COOPER, JR., prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above case on December 14, 1977.

OPINIONS BELOW

The opinion of the Lake County Common Pleas Court is unreported. The opinion of the Court of Appeals of Ohio, Eleventh District, Lake County, Ohio, case number 5-093. The opinion of the Supreme Court of the State of Ohio is reported at 52 OS 2d 163 and 6 OO 3d 377. (A. 25 - 49 and 50 - 60 respectively)

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was made and entered on December 14, 1977, and a copy thereof is

appended to this Petition (A. 50 - 60 & 67). The jurisdiction is this Court is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

1. Whether in a capital case a Defendant is deprived of a fair trial and due process even without a showing of any prejudice when a law enforcement officer, the chief deputy sheriff in charge of the aggravated murder investigation involving the Defendant and who testified at the Defendant's trial against the Defendant, escorts the jury after the case has been submitted to them for deliberation and they are sequestered, to their lodging while fully armed and equipped in Sheriff's uniform.

2. Whether in a capital case the Defendant was denied due process and a fair trial where the Prosecutor:

A) Attacked the integrity of the defense counsel.

B) Commented on the Defendant's failure to present any evidence.

3. Whether in a captial case where the Defendant has been indicted and then after the case has been set for trial substantially later is re-indicted secretly on the same aggravated murder charge with an additional specification, the Defendant's due process is violated along with his right to speedy trial when he is denied his Motion to inspect Grand Jury minutes or Dismissal of the second indictment and not permitted to know what additional evidence, if any, or inconsistencies arose since the first indictment.

4. Whether in a capital case due process and equal protection require that the Defendant be afforded a private investigator at the State's expense to assist in investigating and interviewing lists of more than one hundred supposed witnesses.

5. In a capital case, whether the Defendant's due process is violated where the Prosecutor neglects or refuses to supply the Defendant with discoverable items, evidence, or scientific reports within and under the rules of criminal discovery.

A) Whether the Defendant is denied due process when substantial inculpatory, incriminating evidence is finally furnished by the Prosecutor well past the 35-day rule of Ohio Criminal Procedure within which the Defendant must file his Motion to Suppress and when finally evidence which would be suppressible is turned over to the Defendant, the trial Court overruled the Defendant's Motion to Suppress as not being timely filed within 35 days of arraignment as provided by the Ohio Rules of Criminal Procedure.

B) Whether the Defendant is deprived of due process by the Prosecutor's withholding of evidence when he is under a continuing duty to disclose and under a Court order to disclose, motions to compel and for contempt against the Prosecutor having been filed.

C) Whether the Defendant's constitutional right of due process is violated where a <u>procedural rule operates to deny a substantive right.</u>

6. Whether the Defendant is denied due process and equal protection under the law when he is denied a right to a speedy appeal by the trial Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The principal Constitutional provisions involved are the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. (A. 68 - 69)

STATEMENT OF THE CASE

JAMES W. COOPER, JR., a colored man, was arraigned for the aggravated murder with specification of kidnapping of a 12-year old white girl on February 25, 1974. Subsequently, the Defendant was re-indicted and arraigned on or about May 29, 1974, charging him with the aggravated murder with two specifications: attempted rape and kidnapping of this 12-year old white girl.

The chronology of events in this case is very important and is set forth below:

February 25, 1974, the Defendant was arraigned, entered not guilty plea.

February 26, 1974, the Defendant filed a Request for Discovery.

February 28, 1974, the Defendant filed a Request of Notice of Prosecuting Attorney's Intention to Use Evidence.

March 14, 1974, the Defendant filed a Motion for Discovery.

March 15, 1974, the Defendant filed a Motion for Request of Prosecuting Attorney's Intention to Use Evidence.

May 29, 1974, the Defendant was arraigned in new Indictment, 74-CR-228.

May 29, 1974, the Prosecutor filed Motion for Dismissal of Indictment or in the alternative, Motion for Trial Together or Motion to Amend or Motion to Merge and Amend.

May 31, 1974, Request for Discovery and Inspection filed in Case Number 74-CR-228.

May 31, 1974, Motion to Suppress (Oral Hearing Requested), in Case Number 74-CR-228.

May 31, 1974, Motion to Suppress Statements filed.

May 31, 1974, Motion to Suppress Search filed.

May 31, 1974, Motion to have Disinterested Magistrate hear Motion to Suppress Evidence filed.

June 3, 1974, Defendant filed Motion to Have Prosecutor produce Evidence and to Hire Expert at State's expense.

June 4, 1974, Motion to Compel Discovery filed by Defendant.

June 5, 1974- Motion to Inspect Grand Jury Minutes and/or Motion to Dismiss filed by Defendant. (Also 74-CR-228)

June 5, 1974, Hearing on Motion to Suppress, Court finding Defendant's Motion to Suppress out of rule pursuant to Rule 12 of Ohio Rules of Criminal Procedure, overruling the same. (Journal Entry regarding same filed June 17, 1974) (Motion to Suppress Evidence from issuance of search warrant overruled).

June 5, 1974, Hearing on Motion to Suppress Statements, Court finding Defendant's Motion to Suppress Statements out of rule pursuant to Rule 12 of Ohio Rules of Criminal Procedure, overruling the same. (Journal Entry filed on June 17, 1974).

June 5, 1974, Hearing on Motion to have Disinterested Magistrate hear Motion to Suppress Evidence. Court found the same not well taken and overruled the same. (Journal Entry regarding same was filed June 17, 1974).

June 5, 1974, Hearing regarding Defendant's Motion to Produce Evidence and Hire Expert at State's Expense. (Granted, Journal Entry filed June 17, 1974).

June 13, 1974, Defendant's Motion to Show Cause (on Prosecutor why he has failed to comply with Discovery heretofore ordered by the Court) filed.

June 13, 1974, Motion for Reconsideration of Court's Overruling Motion to Suppress (Oral Hearing Requested) filed.

June 17, 1974, JOURNAL ENTRY FILED: Defendant's Motion to Suppress Evidence from issuance of search warrant is overruled.

June 17, 1974, JOURNAL ENTRY FILED: Defendant's Motion to Suppress Statements is overruled.

June 17, 1974, JOURNAL ENTRY FILED: Defendant's Motion to have a Disinterested Magistrate hear Motion to Suppress Evidence is overruled.

June 17, 1974, JOURNAL ENTRY FILED: Defendant's Motion to have Prosecutor Produce and Hire and Expert at State's Expense is granted.

June 17, 1974, JOURNAL ENTRY FILED: Prosecutor is to provide and continue to provide all discovery that defense is entitled to under Rule 16, Ohio Rules of Criminal Procedure.

June 18, 1974, JOURNAL ENTRY FILED: Defendant's Motion for Discovery found well taken and Court hereby grants the same. (As of Hearing, April 10, 1974).

June 18, 1974, Oral Hearing on Reconsideration of Court's overruling Motions to Suppress. (Overruled.) JOURNAL ENTRY FILED: June 24, 1974)

June 18, 1974, Oral Hearing regarding Defendant's Motion to Show Cause why Prosecutor has failed to comply with Discovery heretofore ordered by the Court. (Overruled) (JOURNAL ENTRY FILED: June 24, 1974)

June 24, 1974, JOURNAL ENTRY FILED: Defendant's Motion for Reconsideration of Court's overruling Motions to Suppress is overruled.

June 24, 1974, JOURNAL ENTRY FILED: Defendant's Motion to Show Cause why Prosecutor has failed to comply with Discovery heretofore ordered by the Court, is found not well taken and is hereby overruled.

A Jury Trial was held and on July 18, 1974, the Defendant was found guilty of aggravated murder with the two specifications of aggravated circumstances of kidnapping and attempted rape. The Defendant was sentenced to death and appealed the decision and the errors of the Trial Court to the Eleventh District Court of Appeals for Lake County, Ohio, raising the QUESTIONS PRESENTED, set forth above, both in the Trial Court and the Court of Appeals on Assignments of Error which decision was affirmed by the Court of Appeals and most recently by the Ohio Supreme Court on appeal in its decision of December 14, 1977.

The chief deputy Sheriff in charge of this homicide investigation who testified at the trial against the Defendant escorted the jury to their place of lodging after the case had been submitted to them for deliberation and after they had been sequestered. The

Defendant's attorney made a Motion for a Mistrial on Thursday, July 18, 1974, the morning after the outrageous events of the evening before were made known to them (R. 2-7 filed March 31, 1976). This chief law enforcement officer of the Lake County Sheriff's Department in charge of this homicide investigation was armed, in uniform, investigated, and testified as to details which resulted in the charge against this Defendant and his conviction.

The Motion for Mistrial was overruled; as an Assignment of Error the Court of Appeals upheld the Trial Court as did the Supreme Court of Ohio.

The Prosecutor in his closing arguments, over the objections of defense counsel (R. 3 - 4 Transcript of Closing Arguments), stated that the defense attempted to say that the Prosecution lied, that the police officers lied, the witnesses lied, and everyone was a liar, the Prosecutor was a liar, etc., and that the defense is based upon "diversion." Furthermore, the Prosecutor indirectly commented on the Defendant's failure to take the stand suggesting that the state's case is "uncorroborated" in effect. This was an improper general attack upon defense counsel's honesty and moreover was a comment by the Prosecutor on the Defendant's failure to testify, all over the objection of the Defendant. (R. 20 - 21). This was raised as an Assignment of Error to the Court of Appeals which affirmed the decision to the Trial Court as did the Supreme Court which found "although the Prosecution in effect accused the Defendant of deliberate diversion, such remark alone could not constitute reversible error," (52 OS 2d at 172), and affirmed the decision of the Court below.

The Defendant filed his Motion to Inspect Grand Jury minutes and/or Dismiss on June 5, 1974, and was overruled (R. 2 Record of Various Motions) on June 18, 1974.

Some evidence developed between the original indictment in February and when the Defendant was subsequently indicated and arraigned in May of 1974 resulting in the Prosecutor presenting the case again to the Grand Jury obviously with new evidence since the second indictment resulted in an additional charge and additional specification and the second indictment was merged with the first indictment over the objection of the Defendant. Although properly motioned for in writing, this Defendant was not allowed to inspect the Grand Jury minutes nor to have a dismissal of the second indictment or at least allow him to see what additional evidence was presented after this lengthy delay. The overruling of the Defendant's Motion was raised as an Assignment of Error but the Court of Appeals upheld the Trial Court as did the Supreme Court suggesting that the defense failed to demonstrate a particularized need, notwithstanding the Defendant's Motion and arguments contained therein.

In partial response to the Defendant's Motion for Discovery, the Prosecutor submitted a list of one hundred proposed witnesses to this indigent Defendant to be called by the state and which had to be interviewed by the Defendant and/or his counsel. This formal motion of the Defendant was overruled by the Trial Court and this action was affirmed by the Court of Appeals and the Ohio Supreme Court.

The Defendant properly and timely requested and moved for discovery and inspection and Notice of Prosecuting Attorney's Intention to use Specific Evidence. Notwithstanding the requirement of the Prosecutor to provide all evidence discoverable under Ohio Criminal Rules of Procedure, the Prosecutor neglected or refused to provide the Defendant with certain critical substantive and culpatory incriminating evidence which would have been suppressible had the Defendant

known about it. Oral hearing on the Defendant's Motion for Discovery was had on April 10, 1974, and the Judge did not order the Prosecutor to comply with the same until his Journal Entry filed June 18, 1974. Defense counsel reviewed tangible evidence April 26, 1974, but did not receive the results of scientific investigations until June 5, 1974. A fiber which was found in the Defendant's car and which was requested to have been suppressed in the Defendant's Motion filed May 31, 1974, directly related according to laboratory findings, scientifically to the towel found around the victim's neck. This information was not turned over to the defense counsel until June 24, 1974. The Trial Court overruled the Defendant's Motion to Suppress as not being timely filed within 35 days of arraignment as provided by Ohio Criminal Rules of Procedure notwithstanding the delay in granting discovery by the Prosecutor and his piecemeal format. Under Rule 45(B), the Trial Court had the power to extend the time for the filing of the Motion to Suppress if the failure to act on time would result in injustice to the Defendant. The withholding of evidence and neglect or refusal to provide discovery is found at (R. 7 - 15, Various Hearings Transcript) and (803 - 804) all over the objections and motions of defense counsel disregarded by the Trial Court and affirmed by the Court of Appeals and the Ohio Supreme Court.

As if this were not enough, the Trial Court's Court Reporter did not prepare the transcript which constitutes the record in this case for some twenty months after the Defendant filed his Notice of Appeal forcing the Defendant to sit on Death Row for this period of time not having an opportunity to have this matter reviewed by the Court of Appeals. This was an Assignment of Error raised to the Court

of Appeals which they denied as did the Ohio Supreme Court.

The Defendant's conviction was in case number 74-CR-086 and the QUESTIONS PRESENTED which will show the Federal questions involved were timely and properly raised, were all presented by oral or written motion or objection of the Defendant and were not properly ruled upon or remedied by the Trial Court. Each of the questions presented involving Federal questions were raised as Assignments of Error in case number 5-903 in the Court of Appeals, Eleventh Appellate District, Lake County, Ohio, and as Propositions of Law in case number 77-219 in the Ohio Supreme Court, both of which found the Assignments of Error and Propositions of Law not well taken overruling same and affirming the Trial Court.

Of the QUESTIONS PRESENTED number one dealing with the officer in charge of the homicide investigation escorting the jury was raised as Assignment of Error number six in the Court of Appeals and Proposition of Law number five before the Supreme Court of Ohio. Question number two Presented dealing with the Prosecutor's closing argument and attack on the integrity of defense counsel and Defendant's failure to present any evidence was raised as Assignment of Error number eight in the Court of Appeals and Proposition of Law number seven before the Ohio Supreme Court. Question Presented number three dealing with inspection of the Grand Jury minutes was raised as Assignment of Error number nine before the Court of Appeals and as Proposition of Law number eight before the Ohio Supreme Court. Question Presented number four dealing with affording an indigent Defendant a private investigator at state's expense to interview witnesses was raised as Assignment of Error number nine in the Court of Appeals and Proposition of Law number ten before the Ohio Supreme Court. Question Presented

number five dealing with prosecutorial manipulation of discovery and Motion to Suppress and a procedural rule denying a substantive right was raised as Assignments of Error twelve, thirteen, fourteen, and fifteen and Propositions of Law numbers eleven and twelve before the Ohio Supreme Court. Question Presented number six was raised as Assignment of Error number twenty-five before the Court of Appeals and as Proposition of Law number twenty-two before the Ohio Supreme Court. (A. 77 - 79)

REASON FOR GRANTING THE WRIT

This Petition raises substantial and important questions concerning the administration of criminal justice in state courts. It involves the deprivation of rights, privileges, and immunities which should be afforded a Defendant but which have been denied both by the Trial Court directly and the Trial Court condoning the wrongful actions of the Prosecutor and Chief Deputy Sheriff. This is a case of significant importance because one of the Defendant's most precious constitutional substantive rights has been eradicated by a procedural rule.

I

A fair trial in a fair tribunal is a basic requirement of due process. To perform its high function in the best way, justice must satisfy the appearance of justice, as this Court held in Estes v. Texas, 381 US 532 (1965). This Court held where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary to find identifiable prejudice in order to conclude that

due process is wanting. Due process requires fundamental fairness. In Re Murchison, 349 US 133 (1955). In allowing the chief law enforcement officer of the County in charge of the homicide investigation to accompany the jury after the case has been submitted to them for deliberation and they have been sequestered is fundamentally unfair and seriously jeopardizes the Petitioner's right of due process. The jury should be free to consider its case and find their verdict unrestrained by the presence of any person. The Petitioner is entitled to a fair trial by a panel of impartial, "indifferent" jurors. To afford the Petitioner or Defendant less than that violates the Sixth and Fourteenth Amendments, (A. 69). This Court adopted a rule in Turner v. Louisiana, 379 US 466 where on certiorari the Supreme Court reversed and held conduct of the trial violated the basic guarantees of a trial by jury in violation of the Fourteenth Amendment.

We believe the Petitioner's case presents an opportunity for this Court to redefine the law supporting the proposition that even without a showing of prejudice to the accused, grounds for reversal occur where an officer whose testimony tends to prove the guilt of the accused is placed in charge of the jury. See the case of State v. Tyarks, 433 SW 2d 568 (1968) which discussed Turner v. Louisiana, supra. This chief deputy in charge of the investigation was present when a statement was taken from the accused and particularly in a capital case any impropriety must be avoided; a mistrial should have been granted as requested. As the Court pointed out in State v. Faught, 120 NW 2d 426, (1963) in granting a new trial, where the Defendant is on trial for his life, it is so imperative that a verdict be based solely on the evidence and the Court's instructions that to permit a sheriff or his deputies to associate with the jurors after the case is submitted is not conducive to this end. Who can say beyond a reasonable doubt that the Defendant was

not prejudiced and denied due process by such inherent unfairness undermining the concept of fair trial by jury and impartiality.

Here, the Ohio Supreme Court, although pointing out that the Trial Court should not permit government witnesses to serve as custodians for the jury, declined to find reversible error (A. 59) and declined to adopt such a rigid rule citing Turner v. Louisiana, supra. The need for this Court to enunciate the standard and principles for the administration of justice and fair trial in jury trials is plain.

II

The Petitioner asked this Court to review this case because it presents the important question of the propriety of the Prosecutor's closing argument where he attacks or assails the opposing counsel suggesting that their tactics are diversionary and creating a cloud characterizing the prosecution, its witnesses, and police officers as liars. General attacks upon opposing counsel's honesty are frequently made through allegations of trickery or bad faith and it has been held to be improper for the Prosecutor to assert the same. People v. Berry, 18 Ill 2d 453, cert. den. 364 US 846, where the Prosecutor stated that defense counsel had resorted to trickery and attempted to "confuse the issue". Also People v. Noland, 126 Cal. App. 623, 14 P. 2d 880; People v. Burnett, 27 Ill, 2d 510; People v. Miller, 26 Ill, 2d 305; Turner v. State, 21 OLA 276, Cochran v. State, 280 So. 2d 42 (1973). This Court has an excellent opportunity to declare that the Petitioner's Sixth Amendment right to a fair and impartial jury trial, effective assistance of counsel, and his Fourteenth Amendment right to due process have been violated to point out that the Prosecutor's primary duty is not to convict but to see that justice is done in an impartial manner. While misconduct during summation of closing argu-

ments does not always require the reversal of a conviction, it is well established that improper argument alone may be sufficient grounds for a reversal. United States v. American Radiator and Standards Sanitation Corporation,433 Fed. 2d 174 (1970). The Ohio Supreme Court erroneously found that (A. 55) "although the prosecution in effect accused the defense of deliberate diversion, such remark alone does not constitute reversible error." With such fundamental freedoms at stake, it is worthy of this Court to consider the propriety of the Prosecutor's comments.

More importantly, however, the prosecution improperly commented on the Defendant's failure to testify in his summation to the jury. The law is quite clear in the United States that in cases coming within the rule of Griffin v. California, 380 US 609, 14 L Ed 2d 106, 85 Sup. Ct. 1229, the comments by the prosecutor on the Defendant's failure to testify constitute reversible error. This is a landmark decision regarding the Fifth Amendment and its direct application to the Federal Government and its application to the States, by reason of the Fourteenth Amendment. See the cases of State v. Howell, 4 OS 2d 11, 33 OO 2d 43; State v. Lynn, 5 OS 2d 106, 34 OO 2d 266; State v. Lewis, 3 O App 2d 189, 32 OO 2d 275; State v. Smith, 10 O App 2d 186, 39 OO 2d 342, State v. Murphy, 13 O App 159, 42 OO 2d 273.

The Record is quite clear as found in Page 20 to 21 of the transcript of closing arguments, that Mr. Mitrovich in his closing stated to the jury the following:

> MR. MITROVICH: "There is little else to say, ladies and gentlemen. I am sure that I could talk all day on this subject turning the facts over and over and keep listing the facts. I submit to you that your responsibility from this point on is a very serious one. And, I ask you to not only listen to my side, but to listen also to the defense's side. But, keep in mind the diversion that has been perpetrated by the defense throughout the trial."

The Prosecutor knew full well that the defense presented no evidence nor any witnesses on the Defendant's behalf and did not permit the De-

fendant to take the stand in his own defense.

The law is clear that the privilege against self-incrimination contained in the Fifth Amendment of the United States Constitution is extended by virtue of the Fourteenth Amendment to the States and the same standards must be met or exceeded in State proceedings to determine whether an accused's silence under his privilege against self-incrimination is justified. See generally, Malloy v. Hogan, 378 US 1, 12 L Ed 2d 653, 84 S Ct. 1489 and Griffin v. California, supra; and Chapman v. California, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824. It is clear that a blatant and obvious reference to the failure of the accused to testify at trial is to be avoided, whether the remark is made in a positive or a negative manner. In our case, where the Prosecutor suggested to the jury over objection that they not only listen to his side but also listen to the defense's side, knowing that they have presented no evidence was reference to the Defendant's failure to testify or suggestion was that the State of Ohio's case was uncontradicted, uncontroverted, undenied or unrefuted. By suggesting that there were two sides to the story, the Prosecutor suggested to the jury that the Defendant would have to take the stand to explain away his alleged guilt. As such, it was an impermissible reference to the Defendant's failure to testify. The prosecution has the burden of showing that the improper comments upon the Defendant's failure to testify constituted harmless error and it must be shown by the prosecution, that there was no reasonable possibility that the comment contributed to the Defendant's conviction. Chapman v. California, supra; Fontaine v. California, 390 US 593, 20 L Ed 2d 154, 88 S Ct 1229; Ross v. California, 391 US 470, 20 L Ed 2d 750, 88 S Ct 1850.

However, the Ohio Supreme Court felt that it was reasonable to conclude (A.55-56) that the Prosecutor was not pointing out the failure of the Defendant to present evidence but requesting the jury to com-

pare conclusions from the Prosecutor's evidence.

This Court spoke forcefully in Griffin, supra, and this case presents, we submit, a good example of the type of situation Griffin was meant to include and encompass in subsequent state cases. We respectfully urge that the Ohio Supreme Court decision is erroneous and at variance with this Court's decisions and intent and that due process cries out for enunciation by this Court; for this Court cannot permit the state Court to be at odds with its mandates under Griffin.

III

It is no secret that the secrecy of the Grand Jury proceedings is under attack. The general rule set forth in Pittsburgh Plate Glass Co. v. United States, 360 US 395 (1959) establishes the traditional Federal rule that ordinarily an accused is not entitled to disclosure of the minutes of the Grand Jury without showing a "particularized" need. However, it should be noted that even this traditional view is being further liberalized by the Federal Courts, see United States v. Youngblood, 379 Fed 2d 365 (1967) where the Court directed that in future trials in that Second Circuit defendants would be entitled, without showing any particularized need, to see all Grand Jury testimony of all witnesses unless the government made a showing that the disclosure of the particular material would jeopardize national security or would be denied for other reasons.

It is respectfully submitted that in the Petitioner's particular situation where there was a presentment of the case to the Grand Jury resulting in an additional specification of aggravated murder, that the basic concept of fundamental fairness to this Defendant and due process under the Constitution requires Petitioner's attorneys to review the Grand Jury minutes to know what additional evidence, if any, or

inconsistencies arose since the first indictment or to have an absolute dismissal of the second indictment.

It is time to explode the secrecy of the Grand Jury proceedings to let the Defendant know what evidence was presented and what inconsistencies arose between successive indictments, and to afford the Defendant an opportunity to cross-examine and confront the witnesses against him by utilizing testimony before the Grand Jury proceedings to point out such inconsistencies.

Our own Ohio Supreme Court disregarded its former directives is State v. Meeker, 26 OS 2d 9, 55 OO 5 which provides for dismissal if there is an unjustifible delay in commencing prosecution as well as unjustifiable delay after indictment. In the Petitioner's case some three months elapsed between arraignment on the original indictment and re-indictment and arraignment on a second indictment which was subsequently merged into the first indictment over the objection of Petitioner. This constitutes a delay in commencing the prosecution and it is fundamentally unfair to the Defendant and violative of his due process and right to a speedy commencement of prosecution.

Because of the cloak of secrecy around the Grand Jury proceedings, Petitioner attempted to particularize his need as best he could by pointing out to the Court the juxtaposition of the two indictments vis-a-vis evidence ought to be introduced and the additional resultant charge. The prosecutorial manipulation of indictments and a fortiori the secrecy of the Grand Jury defeated the Petitioner's right to know and to due process, which should be defined, clarified, and expanded by this Court. This Court should take this case to abolish the traditional gamesmanship and cloak and dagger secrecy of the Grand Jury to afford this Defendant his fundamental Constitutional rights. Whether Ohio's interpretation of the status of the law in respect to

Grand Jury is correct or adequate under Constitutional standards in light of existing developments in the law is a substantial Constitutional question which should be resolved by this Court.

IV

The denial of free investigatory service to an indigent Defendant to assist his defense obviously touches the due process laws as well as the equal protection clause of the Fourteenth Amendment. (A. 69) A criminal defendant's inability to marshal information necessary to present his version of the facts or to investigate or interview the Prosecutor's one hundred witnesses smacks fundamentally of unfairness. To what extent must the Court afford an indigent Defendant full resources equal to that of the Prosecutor? This Court held the equal protection clause required a state-paid transcript of a criminal trial in Griffin v. Illinois, 351 US 12. The principle delineated in the Griffin case and cases to follow demands that a state which prosecutes an indigent must furnish him with every defensive resource that a non-indigent defendant could purchase and that is reasonably necessary "to assure . . . an adequate opportunity to present his claims fairly in the context of the state's . . . (criminal) process." Ross v. Moffitt, 417 US 600; Robert v. LaVallee, 389 US 40; Britt v. North Carolina, 404 US 226. In the case of Mayer v. City of Chicago, 404 US 189, the Equal Protection requirement was stated in terms of assuring "the indigent as effective (a trial) . . . as would be available to the defendant with resources to pay his own way." Defense counsel must be given adequate time to prepare and obviously given adequate resources with which to prepare for trial. If adequate time to prepare for a trial is a constitutional mandate as set forth in Powell v. Alabama, 287 US 45; Ferguson v. Georgia, 365 US 570; Brooks v.

Tennessee, 406 US 605; Townsend v. Bomar, 331 Fed 2d 19, is it not evident why adequate information to prepare is not. As the U.S. Supreme Court has lately recognized in Coleman v. Alabama, 399 US 1 and Adams v. Illinois, 405 US 278, the pre-trial gathering of information is a vital part of the effective assistance of counsel that the Constitution demands. Such a command or Constitutional requirement may be implied from the Sixth and the Fourteenth Amendment rights to compulsory process and the right to effective counsel and in the Due Process requirements of fair balance in criminal procedures. As stated by the Supreme Court in Wardius v. Oregon, 412 US 470, the defendant has a right against an unfair balance or advantage favoring the prosecution. Any criminal procedures that provide "non-reciprocal benefits to the state" in regard to the investigation, preparation, preservation and presentation of its evidentiary case should be constitutionally assailable "when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." See Wardius v. Oregon, supra, at Page 474. Thus, if legal process is available by which the prosecution can detain witnesses, collect or secure evidence favorable to its case, then the prosecution should either be obliged to equally collect, secure or make available witnesses and evidence favorable to the defense or at least the defense should be given equal use of such procedures. The obligation of the Equal Protection Clause is that the state not permit an indigent defendant to be deprived of the "basic tools of an adequate defense," by reason of his poverty. Britt v. North Carolina, supra.

V

The Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amend- (A. 68 - 69)

ment Constitutional rights are fundamental and substantive and cannot be denied by a procedural rule. Where because of prosecutorial manipulation, non-disclosure of evidence in discovery, neglect or refusal to comply with the orders of the Court the Defendant supposedly does not timely file the Motion to Suppress within 35 days of arraignment when, in fact, nothing of significance was suppressible, would put an unreasonable burden on the Defendant, and if this Court does not resolve this question, will result in every criminal case, frivolous motions to suppress statements and searches being filed to protect a defendant's rights to comply with an arbitrary procedural rule to anticipate some subsequently-discovered or revealed evidence from the Prosecutor which might then be suppressible and/or inculpatory or incriminating in nature. The Courts would be burdened with voluminous motions and hearings clogging court's dockets and bogging the administration of criminal justice. But no other conclusion can be drawn than to require filing frivolous motions if the decision of all the lower courts and the Supreme Court of Ohio are followed in this case.

This Court must grant the Writ, clear the confusion, and destroy this mind-boggling precedent. Ohio Criminal Rules of Procedure 12(D) and (C) and Rule 16 and 45 are set forth in the Appendix (A. 71 - 76)

The interests of justice, fair play, and both procedural and substantive due process require the Petitioner to be allowed to file a Motion to Suppress, albeit technically being out of the 35-day rule through no fault of his own solely because the State of Ohio elected to distribute or "dole" discoverable items out past the 35-day rule, to the detriment of the Defendant effectively precluding the Defendant from filing an effective Motion to Suppress within rule time. The decision in the Petitioner's case is inconsistent with Ohio Supreme Court decisions in State v. Smith, 50 OS 2d 51 (1977) which requires a Trial Court to allow the Defendant to file his Motion to Suppress when finally discoverable suppressible items are turned over to him.

This Court has said that a state's control of the procedure in its courts, in criminal cases, is subject to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific applicable provisions of the Federal Constitution. Brown v. New Jersey, 175 US 172, 14 L Ed 119, 20 S Ct 77. The states are free to provide such criminal procedures as they choose, including rules of evidence, provided that none of them infringe on any guarantee in the Federal Constitution. Spencer v. Texas, 385 US 554, 17 L Ed 2d 606, 87 S Ct. 648; Burgett v. Texas, 389 US 109, 19 L Ed 2d 319, 88 S Ct. 258. A state's practices in administering criminal justice are violative of the Due Process Clause when they offend some principle of justice that is fundamental and rooted in the traditions and conscience of the nation. Rule 16 and Rule 12 are procedural Rules and they cannot affect the Defendant's substantive right to challenge an illegal search or an illegal confession.

A number of cases have held that the deception that results from "negligent suppression" of discoverable items is no less damaging than that which is a product of guilt and that non-disclosure entitles the Defendant to the relief of, among other things, a reversal of conviction and new trial or by dismissing the indictment. Levin v. Katzenbach, 124 App. DC 1958; United States v. Birrell, 276 F. Supp. 798. A defendant is not required to show a deliberate suppression of evidence in order to support his claim that he was denied a fair trial according to the court in Ingram v. Peyton, 367 F 2d 933.

This Court in Wardius v. Oregon, 412 US 470, unanimously held that reciprocal discovery required fundamental fairness and that even though the defendant did not comply with the limitation imposed by the State of Oregon regarding his time for filing his notice of alibi that because the prosecution in the case did not grant the discovery

to which the defendant was entitled, that the defendant's failure to file his notice of alibi within the rule of the statute did not apply in the within case because discovery was not granted.

To correct a fundamental deprivation of Constitutional rights, to void a bad precedent which would result in frivolous motions to suppress, etc., this Court must decide the issues in this case and not allow by acquiescence the State of Ohio to have a procedural rule operate to deny the Defendant a substantive right.

VI

Because of the aggravated circumstances in this case, perhaps it is now the time to extend the Sixth Amendment right to a speedy trial as this Court pointed out in Klopfer v. North Carolina, 386 US 213 to the right to a speedy appeal. It appears that the Defendant's due process is somewhat diminished and the Defendant is exposed to cruel and unusual punishment in violation of his Eighth Amendment right and other Ninth Amendment "retained right" when he, through no fault of his own, is required to sit on Death Row for some 20 months before the transcript of proceedings is typed and prepared after his notice of appeal was filed but before he can file his Brief. This Court is always concerned with the prompt and efficient administration of criminal justice and the Petitioner feels this Court should address specifically the problem of delay in appeal as a fundamental deprivation of the Petitioner's Constitutional rights. (A. 68 - 69)

CONCLUSION

For all the reasons set forth above, and the fundamental Constitutional questions involved and attempts to compromise the Petitioner's rights both to a fair and impartial jury trial both by

prosecutorial acts and comments and purported procedural rules it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

- vs -

JAMES W. COOPER, JR.

Defendant-Appellant

JUDGES:
Hon. Edwin T. Hofstetter, P.J.
Hon. Robert E. Cook, J.
Hon. William L. Victor, J.
Assignment

CASE NO. 5-093

OPINION

Decided: December 6, 1976

APPEARANCES:

ATTY. WILLIAM GARGUILO
FOR PLAINTIFF-APPELLEE

ATTY. LEO J. TALIKKA
ATTY. GREGORY M. GILSON
FOR DEFENDANT-APPELLANT

COOK, J.

This is an appeal from a judgment of the conviction and sentencing of the defendant-appellant for the crime of aggravated murder with the specifications of kidnaping and attempted rape. (R.C. 2903.01 (B)).

On February 17, 1974, Rebecca Sue Gilhausen, age 12, was found dead in Painesville Township, Lake County after James W. Cooper, Jr., defendant-appellant, reported his discovery of her body to the Sheriff of Lake County.

On February 22, 1974, the defendant-appellant, hereafter referred to as the appellant, was indicted by the Lake County Grand Jury for aggravated murder with the specification

that the appellant purposely caused the death of Rebecca Sue Gilhausen while committing the crime of kidnaping. The case was eventually scheduled for trial on June 10, 1974. On May 29, 1974, the appellant was charged in count one of a new indictment with purposely causing the death of Rebecca Sue Gilhausen while "committing rape or attempting to commit rape and while committing kidnaping or attempting to commit kidnaping" and set forth specifications of committing rape or attempting to commit rape and committing kidnaping or attempting to commit kidnaping. In addition the indictment of May 29, 1974 contained three other counts which are not pertinent to the prosecution of the instant case.

Upon motion of the prosecuting attorney the trial court ordered that count one of the second indictment of May 29, 1974 be severed from said indictment and consolidated into the first indictment of February 22, 1974.

Upon motion of the appellant, the State was required to elect as to which of the allegations, as to committing or attempting to commit kidnaping and rape, it would proceed upon and the State elected to proceed upon the specifications of committing kidnaping and attempting to commit rape.

On July 18, 1974, the appellant was found guilty of the charge of aggravated murder with the two specifications of kidnaping and attempted rape.

After a "mitigation hearing", the appellant was sentenced to die by electrocution September 4, 1974.

The appellant has now appealed his judgment of conviction and sentence to this court. The appellant has filed twenty-six

assignments of error, but all are without merit.

Assignments of error one, two, and three claim prejudicial error by the trial court in allowing the testimony of Dr. Maxwell Burnham, Lake County Coroner, and Dr. Charles Hirsch, Deputy Coroner of Cuyahoga County.

Appellant argues that neither doctor was established as a duly qualified and licensed physician authorized to practice medicine in the State of Ohio nor was their testimony based on medical and/or scientific certainty.

Appellant also contends neither doctor should be permitted to testify because Dr. Burnham sent the body of Rebecca Sue Gilhausen to the laboratory of the Cuyahoga County Coroner for an autopsy and appellant contends that such an autopsy request was in violation of Chapter 513 of the Revised Code of Ohio.

A review of the transcript of proceedings indicates that the appellant did not object to the testimony of either Dr. Burnham or Dr. Hirsch as to their qualifications as witnesses or as to their testimony as to the cause of death of Rebecca Sue Gilhausen.

The record does indicate that during the testimony of Dr. Burnham a motion was made by the appellant to prohibit his testimony and the testimony of Dr. Hirsch, which was to follow, because Dr. Burnham relied upon the "illegal" autopsy performed by Dr. Hirsch in determining the cause of death of Rebecca Sue Gilhausen and Dr. Hirsch, it was anticipated, would testify to the results of said "illegal" autopsy.

In addition, the transcript of proceedings indicates that, at the conclusion of the State's presentation of evidence, appellar

moved the court to strike the testimony of both doctors because they had not been qualified to testify and did not testify based upon medical and/or scientific certainty.

The law imposes upon every litigant the duty of vigilance in a trial of a case and, where the trial court commits an error to his prejudice, he is required then and there to call the attention of the court to that error. (State v. Kollar, 93 Ohio St. 89, 91).

A just regard to the fair administration of justice requir that an opportunity should be given the court to avoid the commissi of error upon trial, and that, when an error is supposed to have been committed, there should be an opportunity to correct it at once, before it has any consequences. (Adams v. State, 25 Ohio St. 584; Patterson v. State, 96 Ohio St. 90; Glenn v. National Supply Co., 101 Ohio App. 6).

"Generally, an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." (State v. Glaros, 70 Ohio St. 471; State v. Lancaster, 25 Ohio St. 2d 83; State v. Gordon, 28 Ohio St. 2d 45).

The Supreme Court of Ohio in State v. Woodards, 6 Ohio St. 2d 14 held in syllabus 2:

> "2. Ordinarily, in an appeal in a criminal case, no claim of error may be predicated upon alleged irregularities in the proceedings at the trial where defendant knew of such alleged irregularities in sufficient time to bring them to the

attention of the trial court, or where defendant, at his trial, has acted in a manner inconsistent with the position taken upon appeal with regard to such alleged irregularities." (emphasis added)

Here, the appellant chose not to object to the testimony of Drs. Burnham and Hirsch, as to their qualifications as witnesses or to their testimony as to the cause of death, at the time of the testimony, but moved to strike their testimony after the State had rested its case on the grounds that Dr. Burnham was not properl qualified as a witness and neither doctor testified with medical or scientific certainty as to the cause of death.

To wait until the State has completed its case and rested to move to strike testimony which could have been objected to for the same reasons at the time it was presented but wasn't objected to deprives a trial court of an opportunity to avoid or correct any alleged error and will not be considered by an appellate court on review.

Even if the motions to strike or other objections had been timely made, there was no error in permitting Dr. Burnham to testify since he was called as a witness in his capacity as Lake County Coroner and testified that he was the Lake County Coroner.

The testimony of both the doctors as to cause of death could not be prejudicial error in that the death certificate of Rebecca Sue Gilhausen was properly admitted into evidence (State's exhibit 26). The Supreme Court of Ohio in Carson v. Metropolitan Life Insurance Co., 156 Ohio St. 104 held in syllabus 1:

"1. Under Section 2855-11, General Code (now R.C. 313.10), records of a coroner made by himself or anyone acting under his direction or supervision, or transcripts or photostatic copies thereof certified by the coroner, are admissable in evidence as to the facts contained therein."

R.C. 313.19 states:

"The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death." (emphasis added)

The Supreme Court of Ohio has also held that a certified copy of an original certificate of death shall be prima facie evidence in all courts and places of the facts therein stated. (Carson v. Metropolitan Life Insurance Co., supra; Perry v. Industrial Commission, 160 Ohio St. 520).

In the Carson case, supra, the court stated at page 114:

"We hold that 'the facts therein contained' are facts ascertainable from the evidence, such as the nature of the wound and how the wound caused the death as well as a description of the deceased and other information..."

Accordingly, we conclude the trial court did not commit prejudicial error in overruling appellant's motions to strike the testimony of Drs. Burnham and Hirsch.

EDITOR'S NOTE

Pages 31 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

The phrase "corpus delecti", as used in the criminal law and in the law of homicide means the body of the offense, the substance of the crime. (State v. Knapp, 70 Ohio St. 380).

As to homicide, the Supreme Court of Ohio in State v. Manago, 38 Ohio St. 2d 223 held:

> "The corpus delecti, meaning the body or substance of the crime charged, in a homicide prosecution involves two elements, i.e. (1) the fact of death and, (2) the existence of a criminal agency of another as to the cause of death."

The corpus delecti must be proved by the best evidence available, but direct and positive evidence is not essential. (20 Am. Jur. 2d 1083, Evidence, section 1231). It may be established by circumstantial evidence where the inference of the happening of the criminal act complained of is the only probable or natural explanation of the proved facts and circumstances. (State v. Knapp, supra).

In the instant case, the State established the fact of death of the deceased and, by the inferences to be drawn from the manner of death, the device used to cause the strangulation, the death certificate, and the testimony of the various witnesses, the State established that the death of Rebecca Sue Gilhausen was caused by a criminal agency.

Assignments of error five and six complain of the failure of the trial court to strike the testimony of Deputies Sam Avallone and Timothy Mathis and the failure of the trial court to grant a mistrial because Chief Deputy Amiott escorted the jury to the Holiday Inn where they were sequestered for the evening.

No objection was made by appellant to the testimony of Deputies Avallone and Mathis at the time they testified, but at the conclusion of the State's case, counsel for appellant moved to strike their testimony because they did not identify in court the Mr. Cooper they testified about.

Such a motion to strike comes too late for the reasons set forth earlier in this opinion as to the testimony of Drs. Burnham and Hirsch.

In addition, on pages 505 and 517 of the transcript of proceedings Deputy Avallone was asked questions by the State such as "Would you describe the defendant's demeanor while he was in your presence"and,"Have you had contact with the defendant before?" and,"Did the defendant make a response?" These questions asked by the prosecuting attorney, without objection by the appellant, clearly indicated the Mr. Cooper, about whom Deputy Avallone was testifying was in fact the defendant.

As to the testimony of Deputy Mathis, Deputy Mathis did not testify to anything prejudicial to the appellant.

As to the refusal of the trial court to grant a mistrial because Chief Deputy Amiott, a witness in the case, escorted the jury to the Holiday Inn where they were sequestered for the night, it is our opinion that, in the absence of any showing of actual misconduct by Deputy Amiott in relation to members of the jury, we cannot conclude his mere presence influenced or intimidated the jury or created prejudicial error. (Roaden v. Commissioners, 473 S.W. 2d 814; State v. Bailey, 352 A. 2d 415; O'Neal v. State, 486 S.W. 2d 206).

Appellant was given an opportunity by the trial judge to question the court's baliff in whose custody the court had placed the jury, but appellant did not so inquire.

There was no evidence or claim that Deputy Amiott spoke to any members of the jury or in any other way intimidated or influenced the jury.

Assignments of error seven and eight alleged prejudicial error by the prosecuting attorney in his opening statement and closing argument. A review of the record finds no objection to the opening statement of the State in any form at any time in the trial. Counsel for appellant, in his closing arguments, commented on the claimed failure of the State to prove certain claims set forth in its opening statement, but did not raise the question with the court.

Accordingly, this court cannot review any alleged failure of the trial court to have acted.

Regardless of the failure of the appellant to complain to the court, we agree with the court in Makley v. State, 49 Ohio App. 359 where it held that failure of the prosecuting attorney to offer evidence to prove the things he said he expected to prove is not misconduct.

As to prosecutor's closing argument, a review of the transcript of proceedings indicates counsel for the appellant objected five times during final argument of the prosecuting attorney. The trial court sustained objections to remarks of the prosecuting attorney that the defense attempted to say the prosecuting attorney and his witnesses had lied and also sustained an objection to a

statement by the prosecutor that the jury should listen to the "defense's side". The trial court overruled a statement by the prosecuting attorney that the deceased was dead because the defendant had to satisfy an animal lust and a statement of the prosecuting attorney that diversion had been perpetrated by the defense throughout the trial.

A prosecuting attorney has the right to discuss the evidence and draw all reasonable inferences therefrom favorable to his side of the case.

The prosecuting attorney may draw his own conclusion, based upon the evidence, and in argument, he may in a proper way, state them to the jury and argue from such standpoint. (Jones v. State, 11 Ohio App. 441).

We are of the opinion, that the remarks of the prosecuting attorney, to which appellant objects, did not constitute misconduct on the part of the prosecuting attorney since his statements were based on inferences drawn from the evidence introduced in the trial.

A ninth assignment of error alleges prejudicial error in the trial court's overruling of defendant's motion to inspect grand jury minutes and/or his motion to dismiss.

Crim. R. 6 (E) states in pertinent part:

> "...a grand juror, prosecuting attorney, interpretor, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with

> a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury...."

Crim. R. 6 (E) merely put into rule form the holding of the Supreme Court of Ohio in State v. Laskey, 21 Ohio St. 2d 187:

> "Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for purpose of preparation or for purpose of discovery in general; rule is relaxed only when the ends of justice so require, such as when defense shows that a particularized need exists for the minutes which outweighs the policy of secrecy."

We find nothing in the motion filed by the appellant before trial to inspect grand jury minutes and/or his motion to dismiss which would constitute a "particularized need" for him to view the grand jury minutes which outweigh the general policy of secrecy as to the minutes of the grand jury. Nor do we find any showing by the appellant of grounds that "may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

Appellant, in his brief, stated his reasons for his motions as "to see that justice is done in the within case since this is a capital case of upmost importance both for the State of Ohio and to the defendant" and "to establish that a fraud was perpetrated upon the grand jury which may well have had a direct effect on the indictment of the defendant."

But appellant offered no basis for his allegations of seeing "justice is done " or "to establish that a fraud was

perpetrated". In fact, in his conclusion of his brief in support of his motion, he says "because of a possible defect in the presentation of evidence to the most recent grand jury..."

The trial court did not abuse its discretion in refusing to grant appellant's motion to inspect the grand jury minutes and/or motion to dismiss.

The tenth assignment of error contends the trial court erred in granting the prosecuting attorney's motion for dismissal of indictment or, in the alternative, motion for trial together or, in the alternative, motion to amend or, in the alternative, motion to merge and amend.

Crim. R. 13 states in pertinent part:

> "The court may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information..."

The record indicates two indictments were returned against the appellant by the grand jury of Lake County concerning the death of Rebecca Sue Gilhausen. The record further indicates that count one of case number 74-CR-228 was severed from said indictment and consolidated into case number 74-CR-086.

Count one of the indictment in case number 74-CR-228 charged the appellant with aggravated murder while committing or attempting to commit kidnaping and while committing or attempting to commit rape. The earlier indictment in case number 74-CR-086 charged the appellant with aggravated murder while committing the

crime of kidnaping.

In our opinion, the trial court did not abuse his discre under Crim. R. 13, when he "consolidated" or "merged" the first count of the indictment in case number 74-CR-228 with the original indictment in case number 74-CR-086 since the original indictment was included in the first count of the second indictment as one of the specifications.

Eventually, the trial court required the State to elect as to the specifications of committing and attempting to commit kidnaping and rape and the State elected to proceed on the specifications of "committing kidnaping" and "attempting to rape".

The eleventh assignment of error complains that the trial court erred in overruling appellant's motion to hire an investigat at the state's expense.

In our opinion, the trial court did not abuse its discretion in overruling such a request by the appellant near the dat of trial since the trial court did grant appellant's motion for a continuance filed on the same date as his motion for the hiring of an investigator and, thereby, granted additional time to the appellant to prepare for his trial.

Assignments of error twelve and thirteen claim the trial court committed prejudicial error by overruling appellant's motion to suppress and motion to dismiss because they were not timely fil

As to the timeliness of filing motions to suppress, the Supreme Court of Ohio, prior to promulgation of Crim. R. 12, held in several cases that:

"Where defendant and his counsel knew

> of circumstances under which certain evidence was obtained in ample time to prepare and file pretrial motion to suppress such evidence, but did not do so, assignments of error concerning overruling of the trial court on motion to suppress such evidence would not be considered." (State v. Davis, 1 Ohio St. 2d 28; State v. Carter, 21 Ohio St. 2d 212).

Crim. R. 12 (B) states in pertinent part:

> "(B) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:
> (1)....
> (2)....
> (3)Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained;
> (4)....
> (5)...."

Crim. R. 12 (C) states:

> "(C) Motion date. All pretrial motions except as provided in Rule 7(E) and Rule 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions."

Here, the appellant was first indicted on February 22, 1974, but didn't file his motions to suppress the results of a search of his car and certain statements he had given police until May 31, 1974, long after the period of time set forth in Crim. R. 12(C).

The search of appellant's automobile was conducted on February 18, 1974, and a return of the search warrant and an

inventory of what was found in said search was filed in the office of the Clerk of Courts of Lake County on February 19, 1974, and served on the appellant.

Appellant argues that the items seized indicated nothing incriminating until the results of certain laboratory findings and scientific testings were furnished the appellant on June 4, 1974.

The statements of the appellant, which were the subject of one of his motions to suppress were made on February 17 and 18 of 1974, a fact obviously known to the appellant, as well as the fact that the appellant knew what he had told police.

In the instant case, the motions to suppress were based on claims that a search warrant was not based upon probable cause and the statements made by the appellant to the deputies were not voluntarily given. Both grounds for suppression were known to the appellant long before May 31, 1974, the date on which his motions to suppress were filed. There was no reason why appellant could not have challenged the validity of the search of the house and car of the appellant and the voluntary nature of his statements made to the deputies within Crim. R. 12(C).

In our opinion, the trial court did not abuse its discretion in holding that the motions to suppress were not timely filed and, therefore, would not be considered by him.

As to the trial court's ruling on appellant's motion to dismiss because it was not timely filed, Crim. R. 16 (E)(3) states

> "(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a

> party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

Instead of following Crim. R. 16(E) to secure relief when he contends the prosecuting attorney failed to comply with the discovery procedures contained in Crim. R. 16, appellant apparently filed a "motion to dismiss" which is not one of the sanctions listed in Crim. R. 16 (E)(3).

In addition, appellant fails to identify the "motion to dismiss" mentioned in his assignment of error and in fact, does not mention a "motion to dismiss" in his brief in said assignment of error.

Assignments of error fourteen, fifteen and sixteen allege a violation of the constitutional right of the appellant to due process by the prosecuting attorney withholding evidence, a failure of the trial to enunciate clearly his reasons for overruling the appellant's motions to suppress and failure of the trial court to grant appellant's motion for a disinterested magistrate to hear the appellant's motions to suppress evidence.

We are of the opinion there was no denial of due process by the prosecutor's withholding of evidence since Crim. R. 16(E)(3) provides santions if such is the case. Nor do we believe there was any failure of due process as to the "unclear" enunciation by the trial court of the reasons for overruling appellant's motions to suppress. In fact, the record clearly indicates the trial court overruled the motions to suppress because they were not timely

filed.

Nor do we believe appellant's constitutional right of due process was violated by not having a different magistrate hear appellant's motions to suppress than the magistrate who issued the search warrant.

In our opinion, a judge is not disqualified ipso facto to rule on a motion to suppress certain evidence because he had earli issued a search warrant on which evidence was obtained since to so hold would preclude a trial judge from hearing such motions as a motion for a new trial or hearing an action to vacate a judgment on the grounds that he presided over the proceedings which resulte in such judgment.

In the absence of any showing of disqualification, we are of the opinion that a trial judge may rule on all preliminary moti without rendering himself disqualified in the trial of the case. Such preliminary motions would include the issuance of a search warrant upon application and a subsequent motion to suppress the results of a search conducted pursuant to said warrant.

The appellant has not cited to this court any authority for the proposition he now urges upon the court.

Assignment of error seventeen goes to the instructions to the jury of the trial court in charging on "involuntary manslaught and "proximate cause" and failing to instruct the jury that the "attempt" of the defendant had to occur at the time of the alleged murderand that abandonment is an affirmative defense to an attempt

As to the failure of the trial court to charge on "involuntary manslaughter", the Supreme Court of Ohio in State v.

Nolton, 19 Ohio St. 2d 133 spelled out the requirements to charge on included offences when it held:

> "If in a criminal case the evidence adduced on behalf of the defense is such that if accepted by the trier of facts it would constitute a complete defense to all substantive elements of the crime charged, the trier will not be permitted to consider a lesser included offense."

In the Nolton case, supra, the court spelled out the opposite of its holding when it said:

> "On the contrary, if the trier could reasonably find against the state and for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser offense is both warranted and required, not only for the benefit of the state but for the benefit of the accused."

In the instant case, the trial court charged on aggravated murder with specifications of kidnaping and attempted rape and on the included offense of murder, but did not charge on involuntary manslaughter. The evidence before the trial court was such that the appellant was either guilty of aggravated murder or murder or he was not guilty. The evidence before the trier of the facts was such that the trier of the facts could not find that the death was not caused purposefully.

As to the trial court's instruction on "proximate cause", "causation" is a proper instruction in relation to a charge of aggravated murder. Both aggravated murder and murder state "no

person shall purposely cause the death of another...." Even if such a charge was erroneous, it could hardly be prejudicial to the appellant since it placed the additional burden on the State.

As to the trial court's failure to instruct that "attempt" of the defendant had to occur at the time of the murder and that "abandonment" is an affirmative defense to an attempt, we find no request or objection was made by counsel for the appellant with reference to an instruction on "attempt". As to an instruction on "abandonment" as an affirmative defense to an "attempt" the trial court did not err by not so instructing the jury since there was no evidence before the jury of any abandonment of the attempt to rape the deceased.

Assignments of error eighteen and twenty-two complain that the state failed to prove the appellant committed the crime of aggravated murder "while kidnaping and attempting to commit rape" and that the judgment is not sustained by sufficient evidence

These two assignments of error are without merit since the was evidence from which the trier of the facts could find beyond a reasonable doubt that the deceased was under the age of thirteen, was removed from the place where she was found for the purpose to inflict serious physical harm on the victim and to engage in sexual activity against her will and there was evidence from which the jury could determine that there was an attempt to rape the deceased

Therefore, we conclude that there was ample evidence from which a jury could return a verdict of guilty of aggravated murder while "kidnaping and attempting rape".

Assignment of error nineteen claims error was committed

when the trial court allowed State's exhibits 56 through 67 to be considered by the jury when they were never received into evidence.

It is true the transcript of proceedings does not indicat that the trial court, although requested to do so, ever admitted State's exhibits 56 through 67 into evidence, but the same transcr of proceedings does not indicate that State's exhibits 56 through 67 were submitted to the jury for their consideration.

In addition, there was testimony as to the cloth fibers and the towel tending to link the appellant to the death of Rebecc Sue Gilhausen properly before the trier of the facts.

As his twentieth assignment of error, appellant contends the trial court's refusal to grant defendant an "in camera" inspe tion of the prior statements of certain State's witnesses so as to compare them with the in court testimony of the witnesses was prejudicial error.

Crim. R. 16 (B)(1)(g) provides:

> "(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement..."

However, the transcript of proceedings does not indicate counsel for the appellant, in any of the instances complained of, moved the trial court for an in camera inspection of the witness' prior statements. Rather, the transcript of proceedings indicates counsel for appellant asked to see the statements and, after

objection by the prosecuting attorney, a conference was held at the bench with the court out of the hearing of the court reporter and when the court went back on the record the questioning continu

Accordingly, the trial court did not commit error by "refusing" an in camera inspection of the prior statements of each of the witnesses since, according to the transcript, he was not requested to do so.

Assignment of error twenty-one complains that the transcript of proceedings is not accurate because it does not reflect "proffered testimony" as to a prior statement of James Lucky Davis.

However, the record does not reveal any action by the appellant in the trial court to correct the transcript of proceedin in this respect.

This court must presume the regularity of the proceedings in the trial court.

On page 406 of the transcript of proceedings the trial court did permit the proffer of the prior statement of Mr. Davis into the record, but nowhere in the record does it appear that counsel for the appellant so proffered the statement. If the error was on the part of the court reporter, counsel for the appellant should have asked the trial court to correct the record to indicate the proffered statement.

The twenty-third assignment of error is without merit for the reason set forth as to the other assignments of error since appellant offered no other alleged instances of errors of law

The twenty-fourth assignment of error claims the trial court erred in finding no "mitigating circumstances" as listed

in R.C. 2929.04 (B).

R.C. 2929.04 (B) reads as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of evidence:
>
> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

R.C. 2929.03 (E) reads as follows:

> "(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender."

A review of the transcript of the hearing held pursuant to R.C. 2929.04(B) does not reveal any evidence offered by the appellant except his own testimony and that testimony fails to prove by a preponderance of the evidence any of the three criteri

which require mitigation which would preclude the death penalty. In fact, the record of the mitigation hearing does not indicate that the victim of the offense induced or facilitated it, that the offender was under duress, coercion, or strong provocation or that the offense was the product of the offender's psychosis or mental deficiency.

The twenty-fifth assignment of error claims the appellant was deprived of a speedy trial because the court reporter failed to prepare his transcript of proceedings for almost twenty months after the notice of appeal was filed and thus the appellant was deprived of due process and equal protection under the 14th Amendment to the United States Constitution.

Article 1, Section 10 of the Ohio Constitution and the 6th Amendment to the United States Constitution guarantees a defendant in a criminal trial a speedy trial but does not guarante a convicted defendant-appellant a speedy appeal.

The presumption of innocence at the trial level does not exist at the appeal level.

On the contrary, there is a presumption of the regularity of the proceedings at the trial level and the defendant-appellant has the burden of overcoming such presumption at the appellate level.

In Barker v. Wingo, 407 U.S. 514, 33 L.Ed. 2d 101, the Supreme Court of the United States noted that prejudice should be assessed in the light of the interests of the defendant which a speedy trial was designed to prevent. The interests of the defendant were identified as (1) to prevent oppressive pretrial

incarceration.(2) to minimize anxiety and concern of the accused (3) to limit the possibility that the defense will be impaired.

None of these interests of the defendant are present in an appeal.

A review of the record in the instant case and, especially the twenty-six assignments of error filed by the appellant, lead this court to the conclusion that substantial justice has been done in the conviction and sentencing of the appellant for the crime of aggravated murder with specifications of kidnaping and attempted rape and the death sentence was properly pronounced by the trial court in the absence of any proof by a preponderence of the evidence that any of the mitigating criteria established by R.C. 2929.04 (B) existed.

Judgment affirmed.

Robert E Cook
Robert E. Cook

Hofstetter, P.J.
Victor, J., Concur
(Judge William H. Victor, Ninth Appellate District, by Assignment to Eleventh District)
NOTE: If a Journal Entry is not presented to this Court for signature within ten days from the filing date hereof, this Court will journalize this decision sua sponte (Rule 22D) and the time period for review will begin to run therefrom.

APPENDIX B is the Opinion of the Court in State v. Cooper, 52 Ohio St.2d 47, and has not been reproduced here.

APPENDIX C

(Dated Sept. 3, 1974)

C O P Y

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

STATE OF OHIO	)	
	)	CASE NO. 74 CR 086
Plaintiff	)	
	)	
-vs-	)	
	)	JOURNAL ENTRY
JAMES W. COOPER	)	
	)	
Defendant	)	

This day, to-wit: Seotember 3, 1974, came the Lake County Prosecuting Attorney, Paul R. Mitrovich, and William C. Gargiulo, Assistant Prosecuting Attorney on behalf of the State of Ohio, and the defendant, James W. Cooper, Jr., being in Court, and represented by counsel Leo J. Talikka, Esquire, and Gregory M. Gilson, Esquire, the defendant having been found "Guilty" by a jury on July 18, 1974, of Aggravated Murder, in violation of Section 2903.01 of the Ohio Revised Code, with two specifications of aggravating circumstances, to-wit: Kidnapping, in violation of Section 2905.01 of the Ohio Revised Code, and Attempted Rape in violation of Section 2907.02 of the Ohio Revised Code.

Thereafter the Court ordered a presentence report and psychiatric examination which reports are on file.

Copies of the reports have been furnished to the prosecutor and counsel for the defendant. The Court, on the request of the defendant, ordered the defendant to be examined by two psychiatrists of the defendant's choosing. Their testimony was not brought forth at the mitigation hearing and no report of their findings was filed with the Court.

Upon consideration of the reports filed, testimony of Dr. Lantner, of the Lake County Psychiatric Clinic, and testimony of the defendant under affirmation, and the arguments of counsel, the Court finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence.

Thus, considering the nature and circumstances of the offense and the history, character, and condition of the offender, the Court finds that the evidence fails to establish by a preponderance of the evidence.

1.) The victim of the offense included or facilitated it;

2.) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation;

3.) The offense was primarily the product of the offenders phychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The Court then asked the defendant if he had anything to say why judgment and sentence should not be pronounced against him and the defendant having nothing to say.

WHEREFORE, IT IS THE ORDER OF THIS COURT that the defendant, James W. Cooper, Jr., be taken hence to the Lake County Jail, and that within thirty (30) days the Sheriff of Lake County in a private manner, convey James W. Cooper, Jr., to the Ohio State Penitentiary, Lucasville, Ohio, and deliver him to the warden of said penitentiary, and that on the 15th day of January, 1975, the said warden within the walls of the Ohio State Penitentiary in Lucasville, Ohio, and within an enclosure prepared for that purpose, cause a current of electricity of sufficient intensity to cause death to pass through the body of the said James W. Cooper, Jr., and the application of such current continued until the said James W. Cooper, Jr., is dead.

It is further ordered that the defendant pay the costs of this action, taxed at $_____, for

which execution is hereby awarded.

This order is imposed under and by virtue of Section 2903.01 of the Ohio Revised Code.

WHEREFORE, defendant was advised of his right to appeal and to do so without cost, his right to appointment of counsel if unable to obtain counsel, and his right to documents required in that appeal without cost, and his right to have motion of appeal timely filed on his behalf. As the result of these admonitions and defendant's replies thereto, appellate Counsel was asked for.

JOHN M. PARKS
JUDGE, COMMON PLEAS II

APPROVED:

PAUL H. MITROVICH
PROSECUTING ATTORNEY

William C. Gargiulo
Assistant Prosecuting Attorney

APPENDIX D

(Dated Jan. 24, 1977)

C O P Y

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT

COUNTY OF LAKE

COURT OF APPEALS CASE NO. 5-093

STATE OF OHIO

Appellee

-vs-

JUDGMENT ENTRY

JAMES W. COOPER, JR.

Appellant

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, of earlier date, which is incorporated herein by reference.

It is ordered that appellee recover of appellant the costs herein taxed.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A

certified copy of this Entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions. Pursuant to R.C. 2953.07, this Court having affirmed the Trial Court and the date fixed by the Trial Court for execution having passed, this Court set the date of April 15, 1977 for the execution of the death sentence pursuant to law.

EDWIN T. HOFSTETTER

ROBERT E. COOK

WILLIAM H. VICTOR, Ninth Appellate District
Sitting by Assignment

JUDGES

BARNETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 77 TERM
To wit: December 14, 1977

The State of Ohio,
Appellee,

vs.

James W. Cooper, Jr.,
Appellant.

No. 77-219

APPEAL FROM THE COURT OF APPEALS

for LAKE *County*

This cause, here on appeal from the Court of Appeals for LAKE *County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed* for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 15th day o February, 1978, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of LAKE County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* LAKE *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this day of 19

Clerk

Deputy

CONSTITUTION OF THE UNITED STATES

AMENDMENT [IV]

[SEARCHES AND SEIZURES]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V]

[RIGHTS OF PERSONS]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

AMENDMENT [VI]

[RIGHTS OF ACCUSED]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT [VIII]

[PUNISHMENT FOR CRIME]

[1] Excessive bail shall not be required, nor excessive fines imposed, nor [2] cruel and unusual punishments inflicted.

AMENDMENT [IX]

[RIGHTS RETAINED]

Th enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT [XIV]

[RIGHTS OF CITIZENS]

§ 1 [1] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall [2] make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State [3] deprive any person of life, liberty, or property, without due process of law; nor [4] deny to any person within its jurisdiction the equal protection of the laws.

OHIO RULES OF CRIMINAL PROCEDURE

Effective July 1, 1973

RULE 1. Scope of Rules: Applicability; Construction; Exceptions

(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in subdivision (C) of this rule.

(B) Purpose and construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.

(C) Exceptions. These rules, to the extent that specific procedure is provided by other rules of the supreme court or to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) upon extradition and rendition of fugitives, (3) in cases covered by the Uniform Traffic Rules, (4) upon the application and enforcement of peace bonds, (5) in juvenile proceedings against a child as defined in R.C. 2151.011(B)(1) or Rule 2(2) of the Juvenile Rules, (6) upon forfeiture of property for violation of a statute of this state, or (7) upon the collection of fines and penalties. Provided that where any statute or rule provides for procedure by a general or specific reference to the statutes governing procedure in criminal actions, such procedure shall be in accordance with these rules.

RULE 12. Pleadings and Motions Before Trial: Defenses and Objections

(A) Pleadings and motions. Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained;

(4) Requests for discovery under Rule 16;

(5) Requests for severance of charges or defendants under Rule 14.

(C) Motion date. All pretrial motions except as provided in Rule 7(E) and Rule 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(D) Notice by the prosecuting attorney of the intention to use evidence.

(1) At the discretion of the prosecuting attorney. At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of his intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subsection (B)(3).

(2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to raise objections prior to trial under subsection (B)(3), request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Rule 16.

(E) Ruling on motion. A motion made before trial other than a motion for change of venue, shall be timely determined before trial. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(F) Return of tangible evidence. Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if he is entitled to lawful possession thereof. Such order shall be stayed pending appeal by the state pursuant to Rule 12(K) [12(J)] *

(G) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (C), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for good cause shown may grant relief from the waiver.

(H) Effect of plea of no contest. The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(I) Effect of determination. If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that his bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under subsections (B)(1) or (2), when such motion raises issues which were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(J) State's right of appeal upon granting of motion to return property or motion to suppress evidence. The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

If the defendant has not previously been released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

RULE 13. Trial Together of Indictments or Informations or Complaints

The court may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

The court may order two or more complaints to be tried together, if the offenses or the defendants could have been joined in a single complaint. The procedure shall be the same as if the prosecution were under such single complaint.

RULE 14. Relief from Prejudicial Joinder

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown.

RULE 16. Discovery and Inspection

(A) Demand for discovery. Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney.

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record. Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has

been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

(3) Grand jury transcripts. The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) Witness list; no comment. The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(a) Documents and tangible objects. If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests. If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been

made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) Witness list; no comment. The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose. If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery.

(1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Time, place and manner of discovery and inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions. A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

RULE 45. Time

(A) Time: computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the date of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in computation.

(B) Time: enlargement. When an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after expiration of the specified period, if the failure to act on time was the result of excusable neglect or would result in injustice to the defendant. The court may not extend the time for taking any action under Rule 23, Rule 29, Rule 33, and Rule 34 except to the extent and under the conditions stated in them.

(C) Time: unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding.

(D) Time: for motions; affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than seven days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Opposing affidavits may be served not less than one day before the hearing, unless the court permits them to be served at a later time.

(E) Time: additional time after service by mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him, and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period. This subdivision does not apply to responses to service of summons under Rule 4 and Rule 9.

RULE 48. Dismissal

(A) Dismissal by the state. The state may by leave of court and in open court file an entry of dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate.

(B) Dismissal by the court. If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.

ASSIGNMENTS OF ERROR IN THE ELEVENTH DISTRICT COURT OF APPEALS

I. THE COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE TESTIMONY OF DR. MAXWELL BURNHAM.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE TESTIMONY OF DR. CHARLES HIRSCH.

III. THE COURT ERRED IN NOT PROHIBITING THE TESTIMONY BY THE LAKE COUNTY CORONER AND THE CUYAHOGA COUNTY DEPUTY CORONER.

IV. THE TRIAL COURT ERRED IN ALLOWING THE CASE TO GO TO THE JURY FOR CONSIDERATION WHEN NO CORPUS DELICTI HAD BEEN ESTABLISHED.

V. THE TRIAL COURT ERRED IN NOT STRIKING THE TESTIMONY OF DEPUTY SAM AVALLONE AND DEPUTY TIMOTHY MATHIS.

VI. THE COURT ERRED IN NOT GRANTING A MISTRIAL WHEN IT CAME TO THE COURT'S ATTENTION THAT CHIEF DEPUTY AMIOTT OF THE LAKE COUNTY SHERIFF'S DEPARTMENT ESCORTED THE JURY TO THE HOLIDAY INN.

VII. THE COURT ERRED IN ALLOWING REFERENCE BY THE PROSECUTOR IN OPENING STATEMENT TO MATTERS HE DID NOT ATTEMPT TO PROVE.

VIII. THE COURT ERRED IN ALLOWING THE PROSECUTOR TO PERPETRATE AND THE JURY TO CONSIDER THE PROSECUTOR'S IMPROPER AND PREJUDICIAL REMARKS DURING CLOSING ARGUMENTS.

IX. THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO INSPECT GRAND JURY MINUTES AND/OR MOTION TO DISMISS.

X. THE COURT ERRED IN GRANTING THE PROSECUTOR'S MOTION FOR DISMISSAL OF INDICTMENT OR, IN THE ALTERNATIVE, MOTION FOR TRIAL TOGETHER OR, IN THE ALTERNATIVE, MOTION TO AMEND OR, IN THE ALTERNATIVE, MOTION TO MERGE AND AMEND.

XI. THE COURT ERRED IN NOT GRANTING THE DEFENDANT'S MOTION TO HIRE AN INVESTIGATOR AT THE STATE'S EXPENSE. THUS, FAILING TO PROVIDE THE DEFENDANT WITH ADEQUATE FINANCIAL RESOURCES FOR A FAIR DEFENSE DENYING HIM THE EQUAL PROTECTION OF LAWS AND DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT.

XII. THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS AS BEING NOT TIMELY FILED.

XIII. BY RULING THAT THE DEFENDANT'S MOTION TO DISMISS WAS NOT TIMELY FILED WHEN THE PROSECUTOR DID NOT COMPLY WITH DISCOVERY, DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND FUNDAMENTAL FAIRNESS AND WAS VIOLATIVE OF THE INTEREST OF JUSTICE.

XIV. THE DEFENDANT WAS CONSTITUTIONALLY DEPRIVED OF DUE PROCESS BY THE PROSECUTOR'S WITHHOLDING OF EVIDENCE.

XV. THE TRIAL COURT ERRED AND THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL JUDGE DID NOT CLEARLY AND PRECISELY ENUNCIATE HIS REASONS FOR OVERRULING THE DEFENDANT'S MOTIONS TO SUPPRESS.

XVI. THE TRIAL COURT ERRED AND THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY NOT HAVING A DISINTERESTED MAGISTRATE HEAR THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

XVII. THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY IN THE FOLLOWING RESPECTS:

(A) BY ITS FAILURE TO CHARGE ON THE LESSER INCLUDED OFFENSE OF "INVOLUNTARY MANSLAUGHTER."

(B) BY ADDING THE CHARGE OF "PROXIMATE CAUSE" TO ITS INSTRUCTIONS ON AGGRAVATED MURDER.

(C) BY FAILING TO PROPERLY INSTRUCT THE JURY THAT THE "ATTEMPT" OF THE DEFENDANT HAD TO OCCUR AT THE TIME OF THE ALLEGED MURDER OR THAT ABANDONMENT IS AN AFFIRMATIVE DEFENSE TO AN ATTEMPT.

XVIII. THE STATE FAILED TO PROVE THAT THE DEFENDANT COMMITTED AGGRAVATED MURDER "WHILE KIDNAPPING AND ATTEMPTING TO COMMIT RAPE" (THE SPECIFICATIONS) AND THE COURT ERRED IN ALLOWING THE JURY TO CONSIDER AND INSTRUCTING THEM ON THESE SPECIFICATIONS.

XIX. THE TRIAL COURT ERRED AND THE DEFENDANT WAS PREJUDICED IN ALLOWING STATE'S EXHIBITS NUMBER 56 THROUGH 67 TO BE CONSIDERED BY THE JURY WHEN THEY WERE NEVER RECEIVED INTO EVIDENCE.

XX. THE TRIAL COURT ERRED AND THE DEFENDANT WAS PREJUDICED BY THE COURT'S REFUSAL TO GRANT THE DEFENDANT A MANDATORY "IN CAMERA" INSPECTION, WITH COUNSEL FOR THE DEFENSE, TO DETERMINE THE EXISTENCE OF ANY INCONSISTENCIES BETWEEN THE TESTIMONY OF THE PROSECUTIONS' WITNESSES AND THEIR PRIOR WRITTEN AND/OR RECORDED STATEMENTS.

XXI. THE DEFENDANT WAS PREJUDICED AT HIS TRIAL AND IN HIS APPEAL BY AN INACCURATE RECORD OF THE TRANSCRIPT OF THE PROCEEDS CONCERNING THE PROFFER OF THE STATEMENT OF JAMES DAVIS.

XXII. THE JUDGMENT AND FINDING IS NOT SUSTAINED BY SUFFICIENT EVIDENCE.

XXIII. THE JUDGMENT AND FINDING OF THE COURT IS CONTRARY TO LAW.

XXIV. THE COURT ERRED IN FAILING TO FIND THAT A "MITIGATING CIRCUMSTANCE" AS LISTED IN O.R.C. 2929.04(B) WAS ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE BY THE DEFENDANT AND IN NOT IMPOSING A SENTENCE OF LIFE IMPRISONMENT ON THE DEFENDANT.

XXV. THE DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY APPEAL BY THE TRIAL COURT AND OTHERWISE DEPRIVED OF HIS CONSTITUTION RIGHTS IN DUE PROCESS.

XXVI. THE FINDING AND THE JUDGMENT OF THE LOWER COURT WAS ERRONEOUS BY VIRTUE OF THE OTHER ERRORS OCCURRING AT THE TRIAL TO THE PREJUDICE OF THE DEFENDANT AND APPARENT ON THE FACE OF THE RECORD.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

CASE NO. 77-6333

JAMES W. COOPER, JR.)
Petitioner)
v.) BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
STATE OF OHIO)
Respondent)

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SUMMARY OF ARGUMENTS

I. Chief Lake County Sheriff's Deputy Richard Amiott, a witness in the case against petitioner, escorted the jury from the courthouse to the hotel at which it was to be sequestered for the night. The distance involved was approximately 300 meters, and Chief Deputy Amiott had no conversation of any kind with any juror.

Petitoner asks this court to accept this case as a vehicle by which it may forbid any contact between a prosecution witness and the jury under such circumstances. Petitioner thus asks this court to adopt the per se denial-of-due-process rule it rejected in Turner v. Louisiana, 379 U.S. 466 (1965). In Turner, this court held that factors such as the type of custodial relationship the witness experienced with the jury, the degree and length of the associations, and the importance of the witness' testimony at trial were factors to be considered in determining whether a criminal defendant's due process rights are interfered with in a situation presented by petitioner.

On the facts in this case, there is no denial of due process under the rule espoused in Turner. There is no need to adopt any other rule than that set forth in Turner.

II. Petitioner claims his due process rights were interfered with during closing arguments by certain remarks made by the prosecutor.

Initially, it should be noted that petitioner has been unable sub judice to make the clear showing of prejudicial effect required by United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) when the evidence in the case is manifestly against the petitioner-appellant. His claim that he can do so now is thus highly suspect, if unmeritorious.

Secondly, objections were raised at trial to the comments of the prosecutor now claimed to be prejudicial, and those objections were sustained by the trial judge. In the charge, the jury was instructed to disregard anything at trial to which an objection had been sustained. In such situations, this court has held that error, if any, will be deemed to have been cured. Donnelly v. DeChristoforo, 416 U.S. 637 at 644 (1974).

Petitioner also claims prejudice because the prosecution asked the jury to "listen to the defense's side," an allegedly impermissible reference to petitioner's decision not to testify.

But petitoner's claim of prejudice cannot reach the test generally accepted that such comments will not be held to constitute reversible error unless they are manifestly intended or were of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. (See citations in argument.)

In this case, the prosecution was simply commenting on the lengthy and detailed cross examination of the witnesses at trial, as well as the defense's closing arguments. Petitioner was not prejudiced by such statements, and this this case need not be accpeted for review of this allegation of denial of due process.

III. In his third claim herein, petitioner suggests he was prejudiced by a three month delay in the bringing of a second indictment for the same criminal activity. His denial of due process claim must fall in light of United States v. Lovasco, -- U.S. --, 52 L.Ed.2d 752, 97 S.Ct. -- (1977), in that he has failed to show or allege how he was prejudiced by that delay, and further must fail in light of United States v. Marion, 404 U.S. 307 (1971) in that he has failed to show or allege any improper motive on the part of the prosecution.

Petitioner also claims denial of due process in that he was first indicted for murder with the specification of kidnapping (a capital offense), then later indicted for murder with the specification of rape (also a capital crime). He suggests that because of such a sequence of events that he should have been permitted to examine Grand Jury minutes to see what inconsistencies, if any, existed between the presentation of evidence the first time an indictment was requested, and the evidence during the second Grand Jury session on this case. Yet he cannot suggest that the only difference was that scientific testing provided new evidence which allowed the prosecution to seek the indictment with a specification of rape.

In Pittsburg Plate Glass Co. v. United States 360 U.S. 395 (1959), this court adopted the rule that absent a showing of particularized need, a criminal defendant was not entitled due process by denial of a request to review Grand Jury minutes. Such a rule has been adopted in Ohio. Petitioner has failed to make a showing of particularized need, and thus was not denied due process.

IV. In his fourth argument herein, petitioner claims he was denied due process by the refusal of the trial court to provide him an investigator at state expense to interview witnesses.

Petitioner's claim must fall in light of several similar cases. In United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), the court held that the states are not under any constitutional mandate to provide experts to criminal defendants at state expense.

Further, while the trial court denied petitioner's motion for an investigator to interview witnesses, it did grant an alternative motion for a continuance to allow petitioner's court-appointed lawyers the opportunity to perrofm the same task. The granting of such an alternative motion has been held to preserve the due process rights of criminal defendants. (See citations in argument.)

V. Petitoner claims denial of due process because the trial court refused to consider a motion to suppress evidence which was not timely filed under the Ohio Rules of Criminal Procedure, which requires such motions to be filed within 35 days after arraignment.

This court has recently ruled that a state procedural rule may properly require a motion to suppress to be be made in a timely fashion, and if not so made, may properly refuse to hear the issue. Wainwright v. Sykes, -- U.S. --, 53 L.Ed.2d 594, 97 S.Ct. -- (1977).

The only exception to the above rule is a situation in which petitioner and his counsel would not have known of the existence of the evidence or the manner in which it was procured in time so as to make a timely objection under the rule. Such a situation does not exist in this case.

VI. Petitioner finally asks this court to accept this case to promulgate the rule that a criminal defendant is not only entitled to a speedy trial (guaranteed by the Sixth Amendment, and through the Fourteenth, binding upon the states), but is also entitled to a speedy appeal as well.

Petitioner cites no authority for his contention, and for good reason. No authority exists.

In Barker v. Wingo, 407 U.S. 514 (1972), this court discussed the reasons behind enforcement of the requirement of a speedy trial. But after a criminal defendant is convicted of the charge, all those reasons evaporate.

There is no right to a speedy appeal in the Constitution. Petitioner's claim that such a right exists is without merit.

I. PETITIONER WAS NOT DENIED DUE PROCESS BY THE MERE FACT THAT A SHERIFF'S DEPUTY WHO TESTIFIED AT TRIAL ESCORTED THE JURY TO THEIR QUARTERS.

The trial court correctly refused to grant a mistrial because Chief Deputy Amiott, a witness in the case, simply escorted the jury to the Holiday Inn where they were sequestered for the night. It is clear that, in the absence of any showing of actual misconduct by Deputy Amiott in relation to members of the jury, it cannot be concluded that his mere presence influenced or intimidated the jury or created prejudicial error.

As noted by the petitioner, Chief Deputy Amiott of the Lake County Sheriff's Department testified as a witness in the State's case in chief. A few days later the case was submitted to the jury for their consideration; the jury requested at 9:50 p.m. to continue deliberation the following day.

The trial court judge ordered that the jurors be escorted from the Court to the Holiday Inn (approximately 300 meters) by the Lake County Sheriff's Department. Chief Deputy Richard Amiott did escort the jury as they walked from the Court House to the Holiday Inn. Chief Deputy Richard Amiott did not have any conversation with any of the jurors. He escorted them to the door of the Holiday Inn where the jurors entered and then were met by the Court's bailiff. Chief Deputy Richard Amiott did not enter the hotel; he

returned to his office. He was with the jury a very brief period of time.

Appellant was given an opportunity by the trial judge to question the court's bailiff in whose custody the court had placed the jury, but appellant did not so inquire. Furthermore, there was no evidence or claim that Deputy Amiott spoke to any members of the jury or in any other way intimidated or influenced the jury.

This problem has been viewed by other courts, and the general rule is that there is not prejudicial error where a deputy sheriff who testifies in a trial is allowed to escort a jury from one place to another. For example, in Roaden v. Commissioners, 473 S.W.2d 814 (Ky. 1971), the court noted that there was no prejudicial error where a deputy sheriff who testified in an obscenity case was allowed to accompany the jury as it proceeded to and from the theater to view the film.

There was no prejudicial error found in State v. Bailey, 352 A. 2d 415 (Del. Sup., 1976), where police officers who testified had a part in guarding the jury during the jury and had the only personal contact with the jury.

A sheriff's escort to avoid outside influence on a jury is very important, for an important prerequisite to a fair and impartial trial it is the requirement that the jury's verdict be based on evidence received in open court and not from outside sources; thus, a sheriff's escort will

avoid outside influence on the jury. Calley v. Calloway, 519 F.2d 184 (Ga. Ct. App., 1975) A trial court judge must not allow public sentiment about the merits of a cause on trial be expressed in the presence of a jury in such a manner as to influence them. People v. Slocum, 125 Cal. Rptr. 442 (Cal. App., 1975). These principles have been furthered rather than hindered in the instant case.

The correct standard in this situation was adopted by this court in Turner v. Louisiana, 379 U.S. 466 (1965), when it decided to reject the per se rule proposed now by petitioner herein, but instead held that factors such as the type of custodial relationship the witness experienced with the jury, the degree and length of their associations, and the importance of the witness testimony during trial would be factors to be considered in deciding whether a defendant's due process rights were interfered with.

Thus, in Turner, this court found reversible error where two key prosecution witnesses, as sheriff's deputies, served as custodians for the jury throughtout the three-day trial. Although there was nothing to indicate that the deputies discussed the case with the jury, they escorted jurors to and from restaurants and their motels, ate with them, conversed with them, and ran errands for them.

None of the above occurrences are present in the instant cause. Chief Deputy Amiott was appointed to assist the bailiff in walking the jurors to their quarters, as opposed to serving as a bailiff himself throughout the

trial. The record reflects that Chief Deputy Amiott accompanied the jury on a single, short occasion as opposed to sharing meals and conversing with the jurors over an extended period of time. At trial, the chief deputy was not a key witness, but merely in his testimony confirmed the testimony of the other officers who did serve as key witnesses.

The rule enunciated in Turner has protected well the rights of both society and criminal defendants for more than a decade and need not be changed now.

II. PETITIONER WAS NOT DENIED DUE PROCESS BY THE PROSECUTOR'S CLOSING STATEMENT.

In his second argument requesting certiorari, petitioner suggests that he was denied a fair trial and hence due process because of remarks made by the prosecutor during closing arguments. His claim of prejudice has been denied twice before by competent state appeals courts and should not be heard again. Cf. Wainwright v. Sykes, -U.S.-, 53 L.Ed.2d 594, (1977); Stone v. Powell, 428 U.S. 465, 49 L.Ed.2d 1067; 96 S. Ct. 3037 (1976).

In essence, petitioner's request for review is premised upon the motion that prosecutors have too much latitude in commenting upon the evidence during final arguments and that this Court should seize this case as a vehicle to limit that latitude.

Yet the reasons for such latitude are based on strong policy reasons and should not be so easily overturned. See State v. Woodards, 6 Ohio St. 2d 17 (1966).

Further, the decision of two competent state appeals courts was in comformity with the precedents set by this court on the question of prejudice in similar situations.

There is little doubt that the case against the petitioner was a strong one. In such situations, this court has held that a clear showing of prejudicial effect will be required to overturn a conviction. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L.Ed. 1129, 60 S. Ct. 811 (1940), distinguishing Berger v. United States, 295 U.S. 78,

79 L.Ed. 1314, 55 S. Ct. 629 (1935). And in Donnelly v. De Christoforo, 416 U.S. 637, 40 L.Ed.2d 431, 94 S. Ct. 1868 (1974), this court noted (at 416 U.S. 643, 40 L.Ed.2d 437) that "examination of the entire proceedings in this case" was made to determine the extent of any prejudicial effect.

Petitioner has failed to make any such clear showing in this case sub judice. His claim that he can do so now is therefore without merit.

Second, the state appeals courts correctly applied the law as set forth by this court regarding curative instructions. As petitioner notes in this petition, the trial judge sustained counsel's objections to the statements which form the basis for this plea for relief. The trial judge also told the jury the arguments were not evidence and that in any event the jury was not to consider remarks to which an objection was sustained.

This court has consistently held that in such situations, the error, if any, will be deemed to have been cured. Donnelly v. De Christoforo, supra, Singer v. United States 380 U.S. 24, 13 L.Ed.2d 630, 85 S. Ct. 783 (1965); United States v. Socony-Vacuum Oil Co., supra; Holt v. United States, 218 U.S. 245, 54 L.Ed. 1021, 31 S. Ct. 2 (1910).

It cannot be argued that the prosecutor's remarks, even if improper, were so pronounced and so persistent that curative instructions would be deemed to have insufficient effect, Donnelly v. De Christoforo, 416 U.S. at 644, 40

L.Ed.2d at 437, and that the fact situation which gave rise to relief in Berger v. United States, supra, does not exist here.

The state appellate courts have also correctly applied the rule set by this court that where the statements complained of are isolated and only a small part of a lengthy closing argument, that the prejucicial effect will be deemed to be minimal and therefore not so prejudicial as to require reversal. Donnelly v. De Christoforo, supra; United States v. Socony-Vacuum Oil Co., supra. It cannot be argued that the remarks complained of in this case were other than isolated and only a small part of the total closing argument after a lengthy trial.

And finally, this court should apply the narrow standard of review limited to a consideration of due process, and not the broad exercise of supervisory powers this court might exercise in a case originating in a federal court. Donnelly v. De Christoforo, supra. In applying that standard, it must be held, on the facts, that petitioner was not denied the fundamental fairness essential to the very concept of justice.

Petitioner also complains that he was denied due process because the prosecutor asked the jury to "listen to the defense's side," and thereby impermissibly commented on the petitioner's decision not to testify or to offer evidence. In that regard, the analysis of the Ohio Supreme Court Sub

judice can hardly be improved upon, viz:

> A helpful test in determining whether the above comment improperly indicated that the defendant failed to testify on his own behalf at trial is to determine "* * * whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Knowles v. United States (C. A. 10, 1955), 224 F.2d 168, 170.
>
> In the above statement, it is reasonable to conclude that the prosecution, in requesting the jury to "* * * listen also to the defense's side * * *" was not in any way pointing to the failure of the defense to present evidence, but was simply requesting the jury to compare what the defense had to say about the conclusions that could be drawn from the evidence with what the prosecution already proposed. (See, e. g., Clarke v. United States (D. C. App. 1969), 256 A. 2d 782; McCracken v. State (Alaska 1967, 431 P. 2d 513.) Thus, appellant's argument is without merit.

Petitioner has failed to show how his case presents novel or unusual circumstances not governed by prior decisions, and has failed to show exigencies which would require the formulation of a new rule. His petition, therefore, should be denied.

III. A CRIMINAL DEFENDANT IS NOT ENTITLED TO VIEW GRAND JURY MINUTES WITHOUT SHOWING A PARTICULARIZED NEED.

Petitioner has asked this court to take his case as a vehicle to "explode the secrecy of the Grand Jury proceedings." He also alleges impermissible pre-indictment delay prior to the bringing of the second indictment in this case.

Turning first to the latter claim, it should be noted that petitioner alleges no prejudice, only delay. Nor does he allege that delay was an intentional device to gain advantage over the accused.

Petitioner alleges that he was denied due process because three months elapsed between the time he was arrested and the time additional charges were brought, but he fails to show how he was prejudiced by that delay, and under the formulation expressed by this court in United States v. Lovasco, -U.S.-, 52 L.Ed.2d 752, 97 S. Ct. -(1977), his petition must fail for that reason. Petitioner also fails to allege that the pre-indictment delay was the result of improper prosecutoral purpose, and under United States v. Marion, 404 U.S. 307, 30 L.Ed.2d 468, 92 S. Ct. 455 (1971) which requires such purpose, his petition must also fail.

Petitioner alleges denial of due process because he was first indicted for aggravated murder committed during a kidnapping or attempted kidnapping (a capital crime), then later indicted for aggravated murder with a similar specification

of rape (another capital crime). He suggests various sinister motives, inconsistencies, and cloak-and-daggerism in this sequence of indictments.

Yet the murky waters described by petitioner are quickly cleared by the facts: after the original indictment was issued, results of scientific tests gave the prosecution the requisite proof to bring the second charge of murder with the specification of rape.

Petitioner cannot suggest that prosecutors are under a burden to indict him "as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." S h was explicitly rejected in Lovasco, 52 L.Ed.2d at 760). He cannot-and has not-suggested a particularized need. He can only suggest murkiness which does not exist.

This court, in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) established the rule that absent a particularized need a criminal defendant may not inspect the Grand Jury minutes. While that rule has been liberalized by some courts, Cf. United States v. Youngblood, 379 F.2d 365 (1967), the State of Ohio has chosen not to do so, State v. Morris, 42 Ohio St. 2d 307, cert.den. 423 U.S. 1049 (1975); State v. Lasky 21 Ohio St. 2d 187 at 191 (1970) Since the decision of the State of Ohio not to permit inspection is not a denial of due process under Pittsburgh Plate Glass, supra, this court need not concern itself with this aspect of the case unless it is ready to overrule the sound logic

behind that decision and make the Grand Jury proceedings just another vehicle for pretrial discovery. The petition should be denied.

IV. WHERE A DEFENDANT IS GRANTED A CONTINUANCE TO ENABLE HIS TWO COURT-APPOINTED ATTORNEYS ADDITIONAL TIME TO PREPARE HIS DEFENSE, IT IS NOT DENIAL OF DUE PROCESS FOR THE COURT TO DENY DEFENDANT'S MOTION FOR AN INVESTIGATOR AT STATE EXPENSE.

The trial court sub judice granted petitioner additional time to prepare his case, and therefore did not deny him due process when it overruled his Motion to Hire an Investigator at state expense.

A review of the time sequences is necessary to show that petitioner's claim is without merit. On February 22, 1974, James W. Cooper, Jr., was arrested; on June 3, 1974, he filed a Motion to Hire an Investigator, at this time the trial date was set for June 10, 1974; on June 5, 1974, the appellant filed a Motion to Continue and a renewal of the Motion to Hire an Investigator, the Motion to Continue was to July 1, 1974; on June 17, 1974, the appellant's Motion to Hire an Investigator was overruled; on July 1, 1974, the trial commenced; and on July 18, 1974 the jury rendered its verdict.

Petitioner's Motion to Hire an Investigator was predicated upon the fact that it was impossible to interview all of the witnesses and prepare a defense by the trial date set for June 10,1974. However, on June 5, 1974, which was the date that the Motion to Hire an Investigator was filed, the defendant-appellant also filed a Motion for Continuance, which was granted on June 17, 1974, the same date that the

Motion requesting an investigator was overruled. By granting the continuance, the trial court afforded petitioner a reasonable alternative to hiring an investigator. In Britt v. North Carolina, 404 U.S. 226, 30 L.Ed.2d 400 (1971), the court distinguished Griffin v. United States, 351 U.S. 12, cited by petitioner, and held that a defendant is not deprived of equal protection where a specific request of the defendant was denied but alternative devices that fulfilled the same function were available. By the trial court granting the continuance the court afforded petitioner an alternative which enabled him to have the basic tools for an adequate defense. Therefore, there was no need for an investigator.

By the overwhelming weight of authority the rule is firmly established that an indigent accused has no constitutional right to the appointment of a private investigator at state expense. See, Annotation, 34 A.L.R. 3d 1256, 1272, and cases cited therein.

This Court has not directly addressed the issue whether the due process clause requires the appointment of an investigator at state expense. However, a negative answer to the question is clearly indicated by the holding of the Court in United States ex rel. Smith v. Baldi, 344 U.S. 561, 97 L.Ed. 549 (1953), that the states are not under any constitutional mandate to provide experts to indigent defendants free of charge.

Many states have provided by statute for the appointment of an investigator for an indigent accused at

the expense of the state, ususally placing the issue within the sound discretion of the trial court. See Annotation, 34 A.L.R. 3d 1256, supra. Ohio law does not establish such a statutory right. In the absence of a statutory scheme providing for the appointment of investigators, it is generally held that there is no right to a free investigator. State v. Thomas, 452 P.2d 512 (Supreme Court of Arizona, 1969); Watson v. People, 394 P.2d 737 (Supreme Court of Colorado, 1964). See also, Watson v. Patterson, 358 F.2d 297 (10th Cir., 1966), wherein the Federal Court of Appeals agreed with the Colorado Supreme Court.

The facts of this case are similar to the matter before the court in State v. Dillon, 471 P.2d 553 (Idaho, 1970) wherein the Supreme Court of Idaho held that it was not error for a trial judge to refuse to appoint an investigator for an indigent defendant when the motion was supported only by the conclusory statement that the number of witnesses precluded effective preparation of the defense. The Court pointed out that even though such an investigator is authorized by law where "necessary", such was not the case where the defendant's two attorneys had sufficient time to prepare their case and interview the necessary witnesses. See also as requiring a showing of necessity, where authorized by law, State v. Frazier, 514 P.2d 302 (N.M. 1973); and Ruff v. State, 223 N.W. 2d 446, (Supreme Court of Wisconsin, 1974). See also Watson v. State, 219 N.W. 2d 298, (Supreme Court of Wisconsin, 1974), wherein the court, in upholding a

trial court's refusal to authorize the hiring of an investigator for an indigent defendant explained that defense counsel is presumed to have some investigatory expertise. The Wisconsin Supreme Court held that a trial court may grant the defendant a free investigator if the court determines in its discretion that a fair trial cannot be had without one. 219 N.W. 2d at 405.

This Court recognized in Griffin, supra, that in reality, a defendant is effectively precluded from appealing his case if he must pay for the transcript of his trial. The rule in Griffin is based upon necessity. The petitioner in this case had two experienced attorneys representing him at the expense of the state. The court's action in giving them additional time to conduct the necessary interviewing of witnesses, at state expense, was a reasonable alternative to granting the motion to hire an investigator.

However, more important than the Britt rule noted above, it must be noted that on the same date that the trial court overruled petitioner's Motion to Hire an Investigator, the court did grant the petitioner's Motion to Hire an EXPERT. No type of expert was specified by petitioner's Motion nor by the court. Consequently, petitioner could have hired a criminologist or an investigator as his EXPERT. Petitioner did not hire anyone.

The trial court has discretion on whether to allow an indigent to hire private investigators at State's expense. In this present case the court did not grant the specific

Motion to Hire an Investigator. However, the court did grant to petitioner an opportunity to hire any EXPERT of his choice. Petitioner failed to take advantage of this opportunity. If one looks at the total circumstances concerning all of petitioner's motions, it is unreasonable and illogical to conclude that by not granting petitioner's Motion to Hire an an Investigator at the State's expense that the trial court denied due process.

V. PETITIONER WAS NOT DENIED DUE PROCESS BY REFUSAL OF THE COURT TO CONSIDER A MOTION TO SUPPRESS WHICH WAS NOT TIMELY FILED.

Petitioner suggests that he was denied various federal rights because the trial court refused to consider a motion to suppress evidence which was filed well after the time set by rule for such motions.

The essence of petitioner's claim is that he was not provided, via discovery, the significance of the evidence to which he wanted to object until after the 35-day limit set by rule, and that therefore the rule should not have been used to preclude review of the validity of the seisure of such evidence.

The essence of the State of Ohio's reply to petitioner's claim is contained in the holding of the Ohio Supreme Court:

> Where defendant and his counsel know of circumstances under which certain evidence was obtained in ample time to prepare and file (a) pretrial motion to suppress such evidence, but did not do so, assignments of error concerning overruling of the trial court on motion to suppress such evidence would not be considered.
>
> State v. Carter, 21 Ohio St. 2d 212 (1970).
> State v. Davis, 1 Ohio St. 2d 28, (1964).

The chronology of events is dispositive of the question.

On February 18, 1974, petitioner's automobile was searched pursuant to a duly executed search warrant, and several items were seized. A copy of the warrant was served on petitioner and a return of the warrant filed with the

Clerk of Courts the next day. On February 17 and 18, petitioner made statements to law enforcement officials. Petitioner was indicted on a charge of aggravated murder with the specification of kidnapping (a capital offense) on February 22, 1974, and was arraigned on February 25.

But it was not until May 31, 1974--long after the 35-day limit had expired--that petitioner filed a motion to suppress the evidence seized on February 18 because of the alleged insufficiency of probable cause for the issuance of the search warrant. The same day, petitioner filed a motion to suppress the statements made on February 17 and 18, alleging they were not voluntarily given.

There can be no doubt that while a criminal defendant has a right to a hearing on the admissability of evidence if requested, Jackson v. Denno, 378 U.S. 368, 12 L.Ed.2d 908, 84 S. Ct. 1774 (1964), that a state procedural rule may properly require such request to be made in a timely fashion and if not so made, may properly refuse to hear the issue, Wainwright v. Sykes,-U.S.-, 53 L.Ed.2d 594, 97 S. Ct.-(1977).

Petitioner knew that he had made statements and the content of the statements to law enforcement officers long before the expiration of the 35-day limit set by rule. He also knew of the search of his automobile and what items were seized and received a copy of the search warrant and it supporting affidavit long before the expiration of the 35 days.

Petitioner knew very shortly after his arrest he would be on trial for his life. He knew the prosecutoral and police agencies involved would have to prove their case through circumstantial evidence, by piecing together a shred of evidence here, another shred there. His lawyers were neither inexperienced nor naive about the manner in which the state's case would be assembled. Yet they did not, with all this knowledge, challenge the validity of the procurement of the evidence, even though such evidence had the potentiality of being crucial.

Petitioner's claim is that he had no knowledge of the significance of the items seized and the statements made until after the 35-day period. But petitioner confuses the questions of the significance of the evidence itself at trial and the manner in which that evidence was procured.

Improperly seized evidence is suppressed not because it is significant, but rather because the Fourth Amendment was violated. Petitioner had an opportunity to establish that violation and failed to do so. He cannot now claim denial of due process for his failure to make a contemporaneous objection.

VI. A DEFENDANT IN A CRIMINAL CASE IS NOT DEPRIVED OF DUE PROCESS OF LAW OR EQUAL PROTECTION OF THE LAW BY A DELAY IN PREPARATION OF THE TRANSCRIPT FOR HIS APPEAL FROM A CONVICTION.

Petitioner was not denied a right to a speedy trial by reason of delay on his appeal to the Court of Appeals from his conviction of aggravated murder.

Petitioner claims that he was deprived of a speedy appeal because the court reporter failed to prepare the transcript of proceedings for almost twenty months after the notice of appeal from his conviction was filed. Petitioner argues this court shoud extend the 6th Amendment right to a speedy trial applicable to the states through the 14th Amendment to create a new right to a "speedy appeal."

Article 1, Section 10 of the Ohio Constitution and the 6th Amendment of the United States Constitution guarantees a defendant in a criminal trial a speedy trial but has never been construed to guarantee a convicted defendant a speedy appeal. Petitioner offers no authority indicating that a right to a speedy appeal exists. And there is none. An analysis of the foundation of the right to a speedy trial demonstrates that a similar right to a speedy appeal does not exist since the rights that the guarantee of a speedy trial was designed to protect are not present after an individual has been convicted of a crime.

The principles of the speedy trial concept were explained by this court in Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (1972), wherein the court noted that prejudice

to the defendant by denial of a speedy trial should be assessed in the light of interests of the defendants which the right to a speedy trial was designed to protect. The court identified three such interests: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired.

Applying the Barker v. Wingo concept to the present case, it should be noted that the appellant is not being subjected to pretrial incarceration. The appellant has had his day in court and has been found guilty by a jury of aggravated murder. The presumption of innocence has evaporated. There is nothing oppressive in incarcerating a convicted felon pending his appeal. The presumption of innocence at the trial level does not exist at the appeal level. On the contrary, there is a presumption of the regularity of the proceedings at the trial level. The appellant has the burden of overcoming such presumption on appeal.

Of course, an appellant has the opportunity to seek a stay of execution pending resolution of his appeal. Where a trial judge rules that an appellant should not be released during the pendency of his appeal, a "speedy appeal" argument is not the proper way to challenge such a ruling.

The anxiety and concern which the court in Barker v. Wingo identified as prejudicial is that which inherently accompanies an outstanding public accusation which has not yet been proven. The anxiety and concern over the possible loss of jobs, disruption of family life, and other effects can have a devastating impact upon a person supposedly

"presumed innocent". The court is correct in seeking to minimize such anxieties and concerns prior to the trial, and until the defendant is proven guilty. However, once the defendant has been tried and convicted, the presumption of innocence disappears, and these concerns dissipate.

There is much less possibility of an impairment of a defense in an appeal situation. Petitioner makes no claim that the presentation of his arguments on appeal was in any way affected by the delay. In a trial situation speed is much more crucial because delay may result in the absence of witnesses from the jurisdiction, death of a witness, or loss of memory which might affect a defendant's ability to prepare a defense. In an appellate situation, all arguments must be predicated upon facts in the record. The record is quite obviously not subject to the above contingencies. Therefore, delay will not impair the defendant's ability to effectively pursue his appeal.

In United States v. Cifarelli, 401 F.2d 512 (2nd Cir., 1968) cert. den. 393 U.S. 987, the court specifically held that the appellant was not denied his constitutional right to a speedy trial because of a lengthy delay on appeal. The delay included a period of one whole year during which the appellant was without a court-appointed attorney. The court, in denying appellant's speedy trial claim, stated

> The delay was unfortunate, but the constitutional guarantee to a speedy trial upon which appellant relies cannot easily be transposed to an appeal. . . The purpose of the guarantee is to prevent long unjustified incarceration or anxiety prior to trial and to limit the possibility that the memory of witnesses may dim or evidence may be lost, thus impairing the ability of the accused to defend himself. 401 F. 2d at 514.

See also, United States v. Massimo, 432 F. 2d 325 (2nd Cir., 1970); cert. den., 400 U.S. 1022, wherein the Court held that a delay of twelve and one-half months from the filing of the notice of appeal to the date of oral argument did not violate due process.

It stands to reason, also, that delay on an appeal can only prejudice a defendant if his conviction is reversed. Thus, it would also appear that the proper time to assert the right is on retrial. Of course, the same general rules regarding the speedy trial right then apply. See United States v. Sarvis, 523 F.2d 1177 (C.A., D.C.,1975).

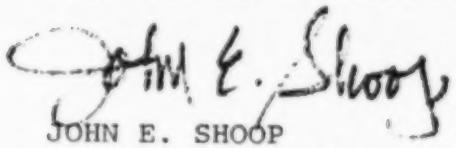
There is no right to a speedy appeal in either the Fifth, Sixth, or Fourteenth Amendments to the Constitution. Petitioner's appeal to this court to create such a right should be rejected.

CONCLUSION

Petitioner was not denied due process of law in the proceedings sub judice. His allegations of denial of constitutional rights were rejected below in accordance with the applicable law as heretofore determined by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition to Certioriari was served on Leo J. Talikka, Esquire, and Joseph R. Ulrich, Counsel for Petitioner, by delivering to their offices at One New Market Place, Suite H-301, Painesville, Ohio, 44077, all in accordance with Rule 33 (1).

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